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80-293

No._____

IN THE

Supreme Court of the United States

October Term, 1980

UNITEX LIMITED, et al.,

Petitioners,

versus

DAN RIVER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners Unitex Limited, Mannip Limited, Cheng Fur She, Cheng Lee Kit-Yiu, Philip Y. S. Cheng, Lee Chen Che, Liu Han Tang, Yang Yuan Loong and Dora Yang respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 29, 1980.

Questions Presented

1. Whether it is permissible consistently with this Court's recent decisions refusing to imply private rights of action under the securities laws to imply a private right of action in favor of a target company under Section 13(d) of the Securities Exchange Act of 1934 so as to enable the target company to seek injunctive or other equitable relief against the acquisition of its shares.

2. Whether, even assuming such a Section 13(d) cause of action can properly be implied in the target company's favor, the opinion of the Court of Appeals in this case is consistent with this Court's opinion in *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975), with respect to the availability of equitable relief to the target company in such a Section 13(d) case.

Parties Below

In the Court below, the petitioners were defendants-appellees. The other defendants-appellees in that Court were Wardley Limited (named in the Court below as The "Doe" Finance Company of Hong Kong and "XYZ" Company) and The Chartered Bank (named in the Court below as The "Roe" Bank of Hong Kong); the opinion of the Court below directed the District Court on remand to dismiss those two parties from the action. Respondent in this Court was plaintiff-appellant in the Court below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinions and Judgment Below

The opinion of the Court of Appeals, not yet officially reported, appears unofficially at [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,515 and is set forth as Appendix A hereto.* The Court of Appeals reversed and remanded with instructions an order and judgment of the United States District Court of Virginia, Honorable D. Dortch Warriner, United States District Judge, dated March 30, 1979. dismissing respondent's amended complaint for mootness and, therefore, lack of subject matter jurisdiction. The unreported decision of the District Court is set forth as Appendix B hereto. The judgment of the Court of Appeals is set forth as Appendix C hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on May 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The principal statutory provision involved in this case is Section 13(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78m(d). Section 18(a) of the Ex-

*After the opinion of the Court of Appeals was filed on May 29, 1980, the defendants-appellees in that Court filed motions to correct and modify the opinion in certain respects. By order filed August 12, 1980, and amended August 18, 1980, the Court of Appeals granted the motions to the extent of modifying its opinion to add a paragraph expressly directing the District Court to dismiss from the action defendants-appellees Wardley Limited and The Chartered Bank, and to amend or delete several sentences in its opinion to correct certain errors not relevant to this petition. The opinion set forth in Appendix A hereto has been modified in accordance with the Court of Appeals' order.

change Act, 15 U.S.C. § 78r(a), is also involved here. The text of both provisions is set forth as Appendix D hereto.

Statement of the Case

Respondent Dan River, Inc. ("Dan River") is a Virginia corporation primarily involved in the manufacture of textiles. Petitioner Unitex Limited ("Unitex"), a Hong Kong corporation, is a manufacturer of men's and women's apparel, primarily for the United States and European markets. Beginning in November 1978, Unitex began purchasing shares of Dan River common stock on the New York Stock Exchange. In late 1978, Unitex organized a wholly-owned subsidiary, petitioner Mannip Limited ("Mannip"), a British Virgin Islands corporation, for the sole purposes of acquiring Dan River stock and holding all Dan River stock then owned or later acquired on behalf of Unitex. Unitex thereafter obtained a definitive line of credit from Wardley Limited ("Wardley") and The Chartered Bank ("Chartered"), two Hong Kong-based banking corporations, to finance future purchases.

On January 29, 1979, Unitex transferred all its Dan River stock to Mannip and all future purchases were made in Mannip's name with funds advanced by Unitex. Mannip's holdings of Dan River stock first exceeded 5 percent of the issued and outstanding shares on January 31, 1979. Consequently, on February 9, 1979, Mannip filed with the Securities and Exchange Commision (the "SEC") and mailed to Dan River a Schedule 13D, in accordance with Section 13(d) of the Exchange Act which requires such disclosure within ten days after a purchaser acquires more than 5 percent of the outstanding shares of a security registered under Section 12 of the Exchange Act. Mannip thereafter continued to purchase Dan River common stock on the New York Stock Exchange and filed amended Schedules 13D to report these additional purchases.

On February 22, 1979, two weeks after Mannip first filed its Schedule 13D, Dan River commenced this action in the

United States District Court for the Eastern District of Virginia. Suing solely under Section 13(d) and asserting an implied private right of action in its favor under that statute, Dan River alleged five claims charging Unitex, several of its directors and their spouses* (the "individual defendants"), Mannip, Wardley and Chartered with a variety of Section 13(d) violations.** The complaint sought injunctive and other equitable remedies, specifically:

> (1) a mandatory order requiring all defendants to file full and complete Schedules 13D;
>
> (2) an injunction preventing the defendants from making further purchases of Dan River stock, or voting the shares they owned, until they filed the Schedules 13D and offered rescission to those Dan River shareholders from whom they had purchased shares; and
>
> (3) a prospective injunction restraining the defendants from "further" violations of Section 13(d).

The complaint did not seek damages or any other legal remedy.***

Contemporaneously with the filing of its complaint, and prior to service of process on any of the defendants, Dan River filed a motion for a temporary restraining order and a preliminary

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*Petitioners Cheng Fur She, Philip Y. S. Cheng, Lee Chen Che, Liu Han Tang and Yang Yuan Loong are directors of Unitex. Petitioner Cheng Lee Kit-Yiu, the wife of Cheng Fur She and the mother of Philip Y. S. Cheng, is a housewife. Petitioner Dora Yang, the wife of Yang Yuan Loong, is also a housewife.

**The first claim, pleaded only against Unitex, Mannip, and several Unitex directors, charged that Mannip's Schedule 13D omitted or misstated various material facts.

The second through fifth claims consisted of varying assertions that persons other than Mannip were required to file Schedules 13D as members of Section 13(d) "groups" or as "beneficial owners" of the Dan River shares held by Mannip.

***Subject matter jurisdiction in the District Court was founded on Section 27 of the Exchange Act, 15 U.S.C. § 78aa.

injunction seeking injunctive and rescissional relief substantially identical to that sought in its complaint. Dan River also moved for extensive, expedited discovery, including very substantial document production and an intensive deposition schedule.

A hearing on Dan River's motions was held on February 23, 1979, the day following commencement of the action. Because of the extremely short notice that Dan River had chosen to give, no defendant was able to submit either affidavits or a brief for the hearing. The District Court heard oral testimony from a single Dan River witness; no witness for any defendant testified. At the conclusion of the hearing, the District Court, rendering its decision orally, found that Mannip's Schedule 13D appeared "to be deficient in some several particulars." Although the District Court expressed doubt as to whether the apparent deficiencies provided a basis for granting equitable relief, it nevertheless entered a temporary restraining order barring the defendants from acquiring any additional Dan River stock until the earlier of March 30, 1979, or twenty-four hours after the filing of an amended Schedule 13D setting forth various facts.

On March 1, 1979, in prompt compliance with the District Court's order, Unitex and Mannip filed an amended Schedule 13D, setting forth in detail all the information called for by the order. That same day, petitioners filed motions to dismiss the complaint for lack of subject matter jurisdiction in that the prompt filing of the amended Schedule 13D rendered moot the only one of Dan River's Section 13(d) claims which stated a legally sufficient claim. Petitioners also argued that Dan River lacked standing to assert an implied right of action under Section 13(d). On March 2—just 24 hours after the new Schedule 13D was filed—Dan River amended its complaint to challenge the new Schedule 13D. In addition to repeating and realleging the allegations of its original complaint, Dan River added a sixth claim for relief charging Unitex, Mannip and several Unitex directors with violating Section 13(d) in that—"on information and belief"—the amended Schedule 13D filed just the day before was "materially false and misleading." The amended com-

plaint prayed for the same equitable relief requested in the original complaint.

When Dan River appeared before the District Court on March 2 to ask for a continuation of the restraining order, the Court rejected the request, finding "that the defendants [had] complied with the substance of the Court's injunction" in the amended Schedule 13D. Moreover, the District Court expressed concern about the existence of subject matter jurisdiction and directed the parties to submit memoranda addressed thereto.* Although Dan River renewed its application for discovery, the Court ordered discovery stayed until resolution of the potentially dispositive jurisdictional issues.

On March 30, 1979, after full written submissions and oral argument, the District Court dismissed the amended complaint for lack of subject matter jurisdiction (see Appendix B). The Court held that, even if the amended Schedule 13D were false, as Dan River alleged, Dan River would not be entitled under this Court's decision in *Rondeau* v. *Mosinee Paper Corp., supra,* to the equitable relief it sought:

> I recognize that [the Amended Schedule 13D] may be false and misleading. If it is false and misleading the protected parties under the Williams Act have an adequate remedy at law. If that is so, and I cannot imagine that it is not so, then there's no grounds for equitable relief.
>
> —Appendix B, p. 27a.

The District Court thus concluded that there was no longer any live "case or controversy" before it:

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*The District Court also directed the parties to address the issue of personal jurisdiction to which all defendants except Unitex and Mannip had objected. No ruling was made on this ground by the District Court in light of its eventual ruling on the issue of subject matter jurisdiction. Similarly, although Unitex, Mannip, the individual defendants and Wardley briefed the issue of Dan River's standing to assert the Section 13(d) claim, the District Court had no occasion to decide this issue.

> I do not believe that there is any basis for equitable relief remaining in this case. That is the only relief that was properly sought and under those circumstances I can't enter a judgment which would affect the actions of anyone. Accordingly, I am going to direct that a docket entry be made dismissing the action for mootness.
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> —Appendix B, p. 31a.

Dan River appealed to the United States Court of Appeals for the Fourth Circuit which, on May 29, 1980, reversed the District Court. As a threshold matter, the Court of Appeals rejected the appellees' contention that Dan River lacked standing to sue under Section 13(d). Although it acknowledged that "Section 13(d) was enacted for the sole benefit of stockholders and not to provide 'armament' to management in resisting takeovers or accumulations of the stock of corporations," the Court of Appeals nonetheless found standing on behalf of Dan River to assert alleged violations of Section 13(d) in an action for equitable relief.

The Court of Appeals then considered the District Court's holding that Dan River's action for injunctive relief was rendered moot by the filing of the amended Schedule 13D and that Dan River's shareholders had an adequate remedy at law if, as alleged, the amended Schedule was false or misleading. Although it recognized the existence of a legal remedy for Dan River's shareholders (see Appendix A hereto, p. 16a), the Court of Appeals held that:

> should Dan River establish that there is a reasonable basis for concluding that the Schedule 13D filed by the defendants is inaccurate, incomplete, or misleading in its statement of any of the matters expressly demanded by section 13(d), the district court may and *should* grant appropriate injunctive relief. . . . (Emphasis added).
>
> —*Id.*, p. 15a.

The Court of Appeals undertook its own review of the adequacy of the amended Schedule 13D and concluded that:

> Dan River has raised sufficient questions about the defendants' compliance with the law to require further exploration by the district court and the parties into the defendants' purpose in purchasing large amounts of Dan River stock.
>
> —*Id.*, p. 20a.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Fourth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court: the standing of a "target" company to assert an implied right of action under section 13(d).

When the incumbent management of a public company attempts to discourage purchases of its stock, it frequently resorts to litigation. Among the foremost weapons in management's arsenal has been an action for injunctive relief under Section 13(d) of the Exchange Act, which has been implied by several Courts of Appeals, including the Court below.*

However, this Court has never held that any such cause of

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*E.g., *Chromalloy American Corp.* v. *Sun Chemical Corp.*, 611 F. 2d 240 (8th Cir. 1979); *General Aircraft Corp.* v. *Lampert*, 556 F. 2d 90, 94 n. 5 (1st Cir. 1977); *GAF Corp.* v. *Milstein*, 453 F. 2d 709, 721-22 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); *Bath Industries, Inc.* v. *Blot*, 427 F. 2d 97 (7th Cir. 1970).

Although a number of district courts have also found Section 13(d) standing for the target company, *e.g.*, *Wellman* v. *Dickinson*, 475 F. Supp. 783, 817 (S.D.N.Y. 1979), two recent District Court decisions have held that no such standing exists in light of this Court's decisions in *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11 (1979) and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). See *Gateway Industries, Inc.* v. *Agency Rent A Car, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,540 (N.D. Ill. June 10, 1980); *Sta-Rite Industries, Inc.* v. *Nortek, Inc.*, Civil Action No. 80-C-471 (E.D. Wis. Aug. 1, 1980).

action should be implied from Section 13(d) and there is grave doubt that such an action actually exists in light of several recent decisions of this Court restricting the scope of implied private rights of action under the securities laws. Certiorari should be granted so that this Court can definitively rule whether or not it does. Petitioners submit that it does not.

Section 13(d), enacted as part of the Williams Act, requires persons who acquire over five percent of any class of stock registered pursuant to the Exchange Act to file a statement with the SEC and the target corporation indicating, *inter alia*, the "background and identity" of the purchaser, the source and amount of funds used in making the purchases, the extent of the purchaser's holdings in the target corporation, and the purchaser's plan with respect to the target's business or corporate structure. 15 U.S.C. § 78m(d)(1). The purpose of the Act is to insure that public shareholders who are confronted by a takeover bid will have adequate information with which to respond. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977); *Rondeau* v. *Mosinee Paper Co., supra*, 422 U.S. at 58.

Unlike other provisions of the federal securities laws,* Section 13(d) makes no provision for a private right of action for its violation. Thus, target corporations, like Dan River, are constrained to argue for the judicial implication of a private injunctive remedy.

In *Rondeau* v. *Mosinee Paper Co., supra*, the sole case decided by this Court directly involving Section 13(d), there was no occasion to decide this issue of standing. The target corporation there sought injunctive relief against a purchaser of its stock for failure to file a timely Schedule 13D. Finding no evidence that the corporation or its shareholders had suffered "irreparable harm," the Court reversed the issuance of a permanent injunction. 422 U.S. at 57. As the Court viewed the case, the "narrow

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*See *e.g.*, Sections 11, 12 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l, 77o, and Sections 9, 16, 18(a) and 20 of the Exchange Act, 15 U.S.C. §§ 78i, 78p, 78r(a), 78t.

issue" before it was whether the record supported the grant of injunctive relief. 422 U.S. at 57. Nevertheless, the Court expressly noted that:

> Although neither the availability of a private suit under the Williams Act nor [the target corporation's] standing to bring it has been questioned here, this cause of action is not expressly authorized by the statute or its legislative history.
>
> —422 U.S. at 62.

Moreover, the Court rejected the notion that Congress enacted Section 13(d) in order to provide target management with the means to deter takeover bids:

> By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts.
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> —*Id.* at 58.

Subsequently, in *Piper* v. *Chris-Craft Industries, Inc., supra,* an action brought by a defeated tender offeror against the target company, its investment banker and a successful competitor for control, the Court declined to imply a private damage action under Section 14(e) of the Exchange Act, added by the same "Williams Act" amendments as added Section 13(d). After an extensive review of the legislative history, the Court concluded that "the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer," 430 U.S. at 35, and that creating a damage action in favor of a defeated tender offeror was "unnecessary to ensure the fulfillment of Congress' purposes in adopting the Williams Act." *Id.* at 41. Although the Court did note that the target corporation's standing to sue was not at issue in the case, *id.* at 42 n. 28, the Court's

analysis of the legislative history of the Williams Act suggests that the target's standing is open to serious question.* As the *Piper* Court concluded:

> This express policy of neutrality scarcely suggests an intent to confer highly important, new rights upon the class of participants whose activities prompted the legislation in the first instance.
>
> —430 U.S. at 30.

Notwithstanding the foregoing, the Court of Appeals in this case held that respondent does have standing under Section 13(d), following the lower court decisions in which it has been held or assumed that a target corporation has such standing. The Court of Appeals, like several of these other decisions, relied upon the authority of *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964), in which this Court, citing the broad remedial purpose of Section 14(a) of the Exchange Act, concluded that private enforcement of the proxy rules was a "necessary supplement" to their administrative enforcement by the SEC.

However, the recent decisions of this Court in *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11 (1979) and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), although not arising under the Williams Act, strongly suggest that the Court of Appeals in this case has adopted an outdated and now discredited mode of analysis of this issue. In *Transamerica* and *Touche Ross*, this Court substantially recast the law re-

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*Thus, the *Piper* Court noted that, in enacting the Williams Act, "Congress was intent upon establishing a policy of even-handedness in takeover regulation." *Id.* at 29. Sensitive to "strong criticisms that the proposed legislation would unduly inhibit tender offers" and cognizant that "entrenched management, equipped with considerable weapons in battles for control, tended to be successful in fending off possibly beneficial takeover attempts," *id.* at 30, Congress sought to " 'avoid tipping the scales either in favor of management or in favor of the person making the takeover bids.' " *Id.* at 31, *quoting* 113 Cong. Rec. 24664 (1967) (statement of Senator H. Williams).

specting the implication of private rights of action.* These cases hold that the judicial task in determining whether to imply a private remedy "is limited *solely* to determining whether Congress intended to create the private right of action asserted. . . ." *Touche Ross & Co.* v. *Redington, supra,* 442 U.S. at 568 (emphasis added). Accord, *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* 444 U.S. at 15-16, 24. Unless the language of a provision, its place in the statutory scheme or its legislative history convincingly demonstrates that Congress intended to create or alter civil liabilities, no private right of action may be implied.** After *Touche Ross* and *Transamerica,* therefore, it is clear that implying a right of action for target companies under Section 13(d) cannot be justified solely on the basis of the reme-

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*Thus, in *Touche Ross,* while declining to overturn its previous decision in *Borak,* this Court clearly limited its precedential authority:

> We do not now question the actual holding of that case, but we decline to read the opinion so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action. . . .
>
> . . . To the extent our analysis in today's decision differs from that of the Court in *Borak,* it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today. . . .
>
> —442 U.S. at 577-78.

***Transamerica* and *Touche Ross* are entirely consistent with the series of cases decided by this Court in recent years narrowing the scope of the federal securities laws, often in the context of private actions under the Exchange Act. See, *e.g., Burks* v. *Lasker,* 441 U.S. 471 (1979) (Investment Company Act and Investment Advisers Acts); *International Brotherhood of Teamsters* v. *Daniel,* 439 U.S. 551 (1979); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975).

Although these cases have involved, for the most part, issues of statutory construction, they also reflect this Court's recognition that "[t]he potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may . . . exist in this type of case to a greater extent then they do in other litigation." *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S. at 741. While the present lawsuit is an action for injunctive relief rather than damages, the *in terrorem* effect of litigation of this nature upon a program of stock purchases such as was involved here is akin to the effect of liberal discovery rules upon a defendant in a 10b-5 damage suit.

dial purposes of Section 13(d) and the "necessity" of implying a private remedy.

Analyzing the language of Section 13(d) in light of *Transamerica* and *Touche Ross*, there is nothing to suggest the existence of a private right of action on behalf of target companies. Section 13(d) "does not in terms create or alter any civil liabilities," *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis, supra*, 444 U.S. at 19; it simply requires that certain disclosures be made. Section 13(d) thus no more purports to create liabilities enforceable in a private suit than do Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a), from which the Court in *Touche Ross* declined to imply a private right of action, or Section 206 of the Investment Advisers Act, 15 U.S.C. § 80b-6, from which the *Transamerica* Court likewise refused to imply a private right of action. For a full judicial analysis of the application of *Touche Ross* and *Transamerica* to Section 13(d), see *Gateway Industries, Inc.* v. *Agency Rent A Car, Inc.*, [*Current*] Fed. Sec. L. Rep. (CCH) ¶97,540 (N.D. Ill. June 10, 1980).

The place of Section 13(d) in the statutory scheme of enforcement under the Exchange Act further belies any Congressional intent to create a private remedy on behalf of target corporations. See *Transamerica, supra*, 444 U.S. at 19-20; *Touche Ross, supra*, 442 U.S. at 571-73. Congress has granted the SEC the power to investigate and to sue to enjoin violations of Section 13(d) and to refer evidence of Section 13(d) violations to the Attorney General for the institution of criminal proceedings. See 15 U.S.C. § 78u(a), (d). Moreover, Congress has provided for several express private remedies under other sections of the Exchange Act, including one pursuant to Section 18(a) on behalf of persons who purchase or sell stock in reliance upon false or misleading statements made in documents, like Schedules 13D, which are filed with the SEC. 15 U.S.C. § 78r(a); see Appendix D hereto. "There is evidence to support the view that § 18(a) was intended to provide the exclusive remedy for misstatements contained in *any* reports filed with the Commis-

sion. . . ." *Touche Ross, supra,* 442 U.S. at 573 (emphasis added). Accord, *Gateway Industries, Inc.* v. *Agency Rent A Car, Inc., supra,* [Current] Fed. Sec. L. Rep. (CCH) ¶97,540, at 97,818-20.

Finally, the legislative history of Section 13(d) does not support a finding of Congressional intent to confer upon target companies a private action for injunctive relief and, indeed, is to precisely the contrary effect. As this Court noted in both *Rondeau, supra,* 422 U.S. at 58-60, and *Piper, supra,* 430 U.S. at 26-36, the shareholders of the target company—and not the target itself—are the intended beneficiaries of the Williams Act. Indeed, the conduct of target companies in resisting takeover attempts was one of the factors prompting the enactment of the Williams Act. See p. 10 n.*, *supra.* Since the requirement that the Schedule 13D be sent to the target was "intended to do no more than give incumbent management an opportunity to express and explain its position," *Rondeau, supra,* 422 U.S. at 58, the target company is not an intended beneficiary of the Williams Act, let alone " 'one of the class for whose *especial* benefit the statute was enacted,' " *Piper, supra,* 430 U.S. at 37, *quoting Cort* v. *Ash,* 422 U.S. 66, 78 (1975). In light of Congress' express disclaimer of any intention to provide a weapon for target management to ward off takeover bids and the " 'extreme care' " it took " 'to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid,' " *Rondeau, supra,* 422 U.S. at 58, *quoting* S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967), the implication of a Section 13(d) right of action on behalf of the target company not only does not further, but *contravenes* Congressional intent.

The significance of the question of federal law presented in this case, its recurrent nature in the course of corporate litigation and the apparent inconsistency of the decision of the Court of Appeals with the recent decisions of this Court concerning the implication of private rights of action under the securities laws all justify the issuance of a writ of certiorari to review the decision below.

2. The decision below conflicts with the decisions of this Court as to the availability of injunctive relief in the absence of irreparable harm.

In *Rondeau* v. *Mosinee Paper Co., supra,* this Court reaffirmed that "the questions of liability and relief are separate in private actions under the securities laws, and that the latter is to be determined according to traditional principles." 422 U.S. at 64. The Court thus rejected the contention that the "bare fact" that a party violates the Williams Act justifies the entry of an injunction against him. *Id.* at 60. The basis of any grant of injunctive relief in the federal courts "has always been irreparable harm and inadequacy of legal remedies." *Id.* at 57, *quoting Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, 506-07 (1975). Since injunctive relief is "historically 'designed to deter, not to punish,'" 422 U.S. at 62, *quoting Hecht Co.* v. *Bowles,* 321 U.S. 321, 329 (1944), its issuance rests in the "sound judicial discretion" of the federal District Court, sitting as a court of equity. 422 U.S. at 61.

The Fourth Circuit's decision clearly conflicts with these strictures of this Court's decision in *Rondeau.* The District Court in this case had determined as a matter of its equitable discretion that Dan River was not entitled to the equitable relief it requested. In its opinion (Appendix B hereto, pp. 24a-31a)—which is not adequately summarized in the Court of Appeals' decision—the District Court carefully balanced a variety of factors in exercising the equitable discretion recognized in *Rondeau* (see pp. 24a-25a, 27a-28a), carefully considered this Court's warnings against discovery abuses in securities laws litigation (see pp. 25a-27a, 29a-30a), and concluded: "I do not believe that there is any basis for equitable relief remaining in this case" (p. 31a). Under *Rondeau,* this was the District Court's decision to make.

Yet in remanding the case to the District Court for further proceedings, the Fourth Circuit concluded:

> [S]hould Dan River establish that there is a reasonable basis for concluding that the Schedule 13D filed by the

> defendants is inaccurate, . . . the district court may and *should* grant appropriate injunctive relief. . . . (Emphasis added)
>
> —Appendix A, p. 15a.

The Fourth Circuit's conclusion that the District Court on remand "should" grant injunctive relief in the event it finds a violation cannot be squared with *Rondeau*'s holding that the propriety of granting injunctive relief is a matter for the *District Court's* "sound judicial discretion." Thus, even if Dan River were able to prove a violation of Section 13(d), the District Court's determination *not* to issue injunctive relief would be reviewable only as an "abuse of discretion"—which the Court of Appeals here did not find.

Petitioners submit, moreover, that the Fourth Circuit's decision was erroneous because there was in fact no abuse of discretion by the District Court and, indeed, no basis for the issuance of injunctive relief in this case. As the District Court correctly recognized, if, as Dan River alleges, the amended Schedule 13D is false, any shareholder harmed thereby has an adequate remedy at law for damages.* *Rondeau, supra,* 422 U.S. at 60 ("[T]hose persons who allegedly sold at an unfairly depressed price have an adequate remedy by way of an action for damages, thus negating the basis for equitable relief"); *General Aircraft Corp.* v. *Lampert,* 556 F. 2d 90, 97 (1st Cir. 1977); *Missouri Portland Cement Co.* v. *H.K. Porter Co.,* 535 F. 2d 388, 399 (8th Cir. 1976); *S-G Securities, Inc.* v. *Fuqua Investment Co.,* 466 F. Supp. 1114 (D. Mass. 1978). Since Dan River simply could not satisfy this traditional prerequisite of extraordinary relief, the decision of the Court of Appeals conflicts with *Rondeau.*

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*See Section 18(a) of the Exchange Act, 15 U.S.C. § 78r(a), discussed at pp. 12-13, *supra,* which provides an express remedy for false or misleading statements made in SEC filings. Since "the sole purpose of the Williams Act [is] the protection of investors who are confronted with a tender offer," *Piper* v. *Chris-Craft Industries, Inc., supra,* 430 U.S. at 35, the irreparability of the harm to Dan River's shareholders—not Dan River itself or its incumbent management—is the proper subject of inquiry.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

August 26, 1980

APPENDIX A—Court of Appeals Decision.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1267

DAN RIVER, INC.

Appellant,

versus

UNITEX LIMITED; MANNIP LIMITED; CHENG FUR SHE; CHENG LEE KIT-YIU; PHILIP Y. S. CHENG; LEE CHEN CHE; LIU HAN TANG; YANG YUAN LOONG; DORA YANG; THE "ROE" BANK OF HONG KONG; THE "DOE" FINANCE COMPANY OF HONG KONG; "XYZ" COMPANY,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued: January 9, 1980. Decided: May 29, 1980

Before RUSSELL, Circuit Judge, FIELD, Senior Circuit Judge, and SPROUSE, Circuit Judge.

MAX GITTER (ARTHUR L. LIMAN, JACK HASSID, COLLEEN MCMAHON, ANDREW J. PECK, PAUL, WEISS, RIFKIND, WHARTON & GARRISON; LEWIS T. BOOKER, GREGORY N. STILLMAN, HUNTON and WILLIAMS on brief) for Appellant; MICHAEL SCHWARTZ, BALDWIN TUTTLE, EDMUND KERR (WACHTELL, LIPTON, ROSEN & KATZ; CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL; KUTAK, ROCK & HUIE; WICKWIRE, PETERSON & GAVIN; CLEARY, GOTTLIEB, STEEN and HAMILTON on brief) for Appellees.

Appendix A—Court of Appeals Decision

RUSSELL, CIRCUIT JUDGE:

This is an action by the plaintiff Dan River for injunctive relief under the Williams Act[1] against the defendants, Unitex Limited, a Hong Kong corporation, its subsidiary Mannip Limited, a British Virgin Islands corporation, Unitex's controlling directors and stockholders, and two Hong Kong banks. The district court at first granted the plaintiff a temporary restraining order pending further clarification of the defendants' 13D Schedule as required under the Williams Act, but, after the defendants amended their earlier filing, it dismissed the action on jurisdictional grounds. The plaintiff has appealed. We reverse.

I

The plaintiff is a large textile manufacturing corporation chartered under the laws of Virginia with its headquarters in Danville, Virginia. Its capital stock at times appropriate to this action consisted of 5,595,035 shares of common stock. The defendant Unitex Limited is a corporation engaged in the manufacture in Hong Kong of textiles which it offers for sale in Europe and the United States. The individual defendants, all residents of Hong Kong, own over two-thirds of the capital stock of Unitex and are its controlling directors.

Sometime in the fall of 1978, Unitex, on the recommendation of its retained investment advisor, Lazard Freres & Company, an internationally known investment firm, determined to acquire a substantial equity position in Dan River stock. In order to finance such purchases, it began negotiations with the executive director of the defendant Wardley Limited, a Hong Kong financial institution, for a loan to finance its purchase of Dan River stock. Wardley expressed a willingness to consider such financing, "provided that Wardley's could be assured of the fundamental *financial soundness of Unitex's plan.*" (Italics

[1] 15 U.S.C. §§78m(d)-78m(e).

added) Apparently, Wardley received sufficient assurances of "the fundamental financial soundness of Unitex's plan" for acquiring an equity interest in Dan River, for Wardley advanced Unitex initially what is described as bridge financing in the amount of $2,700,000 for the purpose of initiating the purchase of Dan River stock.

By December 1, 1978 Unitex, or individuals affiliated with it in its plan for acquiring a substantial equity position in Dan River stock, had accumulated at least 62,700 Dan River shares. Of these, 47,800 shares were purchased by two of the individual defendants, or members of their immediate families. Between December 1 and December 12, Unitex itself acquired 216,900 shares of Dan River stock by purchase made on the New York Stock Exchange. If these purchases were combined with the earlier purchases, the plaintiff contends, though the defendants deny, that Unitex or persons within its controlling group would have owned 279,600 Dan River shares or just over 5 percent of Dan River's outstanding stock. Under the provisions of § 13(d) of the William Act, any person, upon acquiring more than 5 percent of the stock of any corporation, is required to file with the Securities and Exchange Commission within ten days after acquiring such stock ownership, and to mail to the target corporation, a Schedule 13D disclosing (a) the identities and background of the purchasers, (b) their purposes in acquiring the stock, (c) the sources of their financing, (d) the extent of their acquisitions, (e) any arrangement or contracts with other persons concerning the stock and (f) any other material information. This statute was supplemented by more specific regulations issued by the Securities and Exchange Commission. 17 C.F.R. § 240.13d-1, *et seq.* (1978). The parties, however, did not file the required 13D Schedule and, on December 14, the individual defendants sold 47,800 shares in block trades on the Stock Exchange. Of these, forty thousand appear to have been sold back to Unitex but 7,800 shares were disposed of to another party. It is the plaintiff's contention that these sales were made for the purpose of avoiding any possible

obligation to file a 13D Schedule. The defendants, however, deny the necessity to sell such stock in order to avoid any obligation to file a 13D Schedule and assert that these sales were made because the purchases by the individuals, made allegedly without the knowledge of Lazard, violated a Lazard policy that "whenever it is advising a client (here, Unitex) with respect to a program of stock purchases, its client must see to it that no purchases of the stock in question are made by related firms or individuals at the same time."[2]

Whatever the purpose of the sale of 47,800 shares previously purchased, Unitex discontinued after December 14 any further purchases of Dan River stock until (1) it had established a corporate subsidiary, the defendant Mannip Limited, in the British Virgin Islands, whose sole purpose was to acquire all future purchases of Dan River stock on Unitex's behalf and to hold all Dan River stock then owned or later acquired on behalf of Unitex, and (2) until it had completed its final financing arrangements with Wardley and its associated bank, the defendant Chartered Bank. Sometime in January, 1979, it, however, had completed both the incorporation of Mannip Limited and finalized its financing arrangements with Wardley and the Chartered Bank.

Under its agreement with the two financial institutions, Unitex was granted a line of credit in the amount of $13,300,000 in order to purchase Dan River stock. However, under the loan agreement, the price at which Unitex purchased stock required approval of the banks. To secure this loan, Unitex pledged its interests in Mannip (that is, it pledged all the Dan River stock acquired by it) and the worth of Unitex itself. In addition, four Unitex directors personally agreed to advance approximately $1,000,000 against the loan and to guarantee individually the remainder of the loan should Unitex default.

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[2]Lazard justified this policy as a "matter both of good financial practice and of practical prudence (*i.e.*, to avoid to the extent possible, involvement in just the kind of litigation which has eventuated here)."

On January 29, 1979, Unitex resumed purchasing Dan River stock, quickly acquiring sufficient shares to bring Unitex within the filing requirements of § 13(d). At this point it transferred all its Dan River stock to its nominee, the corporate subsidiary Mannip, and all future purchases were made in Mannip's name but with funds advanced by Unitex. Because its holdings had by the end of January gone over the 5% level, thereby triggering the requirement of a § 13(d) filing, a 13D Schedule was filed with the Securities and Exchange Commission by Mannip on February 9, 1979, and mailed to Dan River on the same date.

This 13D Schedule, as filed *only* by Mannip, fixed Mannip's ownership of Dan River stock at that time as 333,700 shares, described the relationship between Unitex and Mannip, and included some information about Unitex's directors and their transactions in Dan River stock. It stated the purpose of the Dan River stock purchases as follows:

> "While Mannip is not solely a passive investor in the Company, neither Mannip nor Unitex has any present intention to seek control of the Company or to propose a merger or similar transaction with the Company. Mannip may seek to acquire a significant equity interest in the Company with a view toward establishing a long term relationship with the Company. Mannip is continuing to purchase Shares in open market transactions, and, depending on market and other conditions, Mannip may continue in the future to purchase Shares from time to time in open market or private transactions."

Dan River filed on February 22 its action against the defendants alleging various omissions and misleading statements in Mannip's filing and improper failure by other defendants either to join in Mannip's filing or to make their own filing. It sought declaratory, injunctive, and other equitable relief. In connection with the commencement of its action, Dan River

also moved for a preliminary injunction and applied for a temporary restraining order pending the hearing on the motion for an injunction. After a hearing on the application for a temporary restraining order held on February 23, 1979, the district court ruled that "plaintiff's right to [additional] disclosure [was] clear" and restrained the defendants from making any additional purchases of stock until they had filed "an amended or new Schedule 13D which makes the appropriate disclosures." The district court proceeded to specify the additional material to be included in the "amended new Schedule 13D":

> "a. The identities and backgrounds of PAS, Ltd. and CMS, Ltd.;
>
> "b. The extent of the non-pasive position and objectives that defendants propose to be able to effect from their holdings of plaintiff's stock;
>
> "c. The entities which defendants propose for the establishment of long-term relationships with plaintiff.
>
> "d. The identities of the foreign lending institutions and the agent referred to in the exhibits annexed to defendant Mannip Ltd.'s Schedule 13D filed on February 9, 1979;
>
> "e. Whether the individual defendants have arranged for financing for the acquisition of plaintiff's shares and, if so, the sources of the funds; and
>
> "f. The background information required by Section 13(d) of the Williams Act for each of the individual defendants;"

The district court also set a hearing on the motion for a preliminary injunction and directed the parties to engage in discovery on an expedited basis prior to that hearing.

Mannip and Unitex filed a new Schedule 13D on March 1,

1979. This new filing supplied a number of the omissions noted by the court at the earlier hearing on the application for a preliminary restraining order and added a new statement of the purpose of the stock accumulations. This new statement of purpose was:

> "The purpose of Mannip's purchasing Shares is to acquire an equity investment in the Company. The Filing persons intend continuously to evaluate Mannip's position in the Company and the Company's business and industry. The Filing Persons presently intend for Mannip to make additional purchases of Shares in open-market or private transactions, the extent of which will depend upon such evaluation and upon prevailing market and other conditions. Neither Mannip nor Unitex presently intends to seek to acquire control of the Company, to seek representation on the Company's Board of Directors, to seek joint ventures or other business relationships with the Company or to propose a merger or similar transaction with the Company. In addition, depending upon the results of such evaluation and upon prevailing market and other conditions, Mannip may dispose of all or a portion of its Shares.
>
> Since the Filing Persons could determine to seek to acquire control of the Company, seek representation on the Company's Board of Directors, seek joint ventures or other business relationships with the Company or propose a merger or similar transaction with the Company, Mannip should not be considered solely as a passive investor. However, it should not be assumed that a plan will in fact be formulated to do any of the foregoing.
>
> Except as set forth above, there are no present plans or proposals which relate to or would result in a merger, reorganization or liquidation involving the Company, the sale or transfer of a material amount of the Company's assets, any change in the Company's Board of Directors

or management or any other material change in the Company's business or corporate structure."

With the filing of this new or amended Schedule 13D, the defendants moved to dismiss the complaint for lack of subject-matter jurisdiction. They predicated such motion on the claim that they had fully complied with the earlier order of the district court and had met the requirements of § 13(d), thereby rendering plaintiff's action moot.

The next day after the defendants made their filing the plaintiff amended its complaint, charging omissions, inconsistencies, and contradictions in the amended 13D Schedule. It particularly found the purpose clause flawed in these respects:

"a) On information and belief, defendants fail to disclose that they are buying Dan River stock as alter egos for Textile Alliance Limited ("TAL"), a major Hong Kong textile enterprise founded and operated by defendants Lee and Yang, two of the Controlling Directors of Unitex. On information and belief, defendants fail to disclose that one of defendants' and TAL's purposes in sponsoring defendants' acquisition of Dan River is to seek a position of sufficient control or influence in Dan River to enable TAL or defendants to obtain on unduly favorable terms textiles made by Dan River that are in short supply in the world market, thereby misappropriating a valuable commercial asset of Dan River and its stockholders.

"b) The statements in Item 4 of Amendment No. 2 contradict statements made in Item 4 of Mannip's Schedule 13(D) filed February 9, 1979 even though defendants state in the Amendment that the original Schedule 13(D) fully and adequately disclosed defendants' true purposes.

"c) Item 4 fails to disclose fully the 'non-passive' role defendants intend to play in Dan River, or to identify the

'long-term relationship' that defendants may seek to establish with Dan River although this Court has specifically instructed defendants to make such disclosures.

"d) Amendment No. 2 fails to disclose the purposes for which the Controlling Directors are involved in this transaction."

The plaintiff then moved to continue the restraining order the district court had earlier granted. The district court, however, refused the motion and vacated the restraining order previously allowed. It also reversed its earlier provision for discovery. Sometime later, it heard the motion for a preliminary injunction. At the hearing both parties submitted various affidavits. At the conclusion of the hearing, spread over a period of several days, the district court denied the motion and granted the motion to dismiss the action on jurisdictional grounds.

II

In dismissing the action, the district court declared that § 13(d) of the Williams Act "was intended [simply as a disclosure act] . . . for the benefit of investors and not management" and was not to be used "as a tool for management to preserve their offices." It added that "management [had] no rights under the Williams Act," only a role to act as "the conduit by which the disclosed information [was to be] transmitted to the [stockholders]." It seemed to assume, though it did not say so explicitly, that, in discharging its role of a "conduit," the target corporation may require the defendant in an equitable action to file a Schedule 13D which would *facially* meet the requirements of the statute but that, when that had been done, the target corporation—and, for that matter, the district court itself—has no right to question the accuracy, truthfulness, or completeness of such Schedule or to complain that in any material instance the Schedule was "false or misleading," but that such right was exclusively the right of a stockholder to be ex-

ercised in an action for damages.[3] It had earlier, in dissolving the restraining order previously granted by it, stated that, while a "question of the truth or falsity of the 13D" was "grave," the court could not "entertain a notion [sic] at this time that [any] material statement in the 13D Schedule [was] false." It appeared from this statement to hold that, in a 13(d) action by a target corporation, the district court was to accept as "true" the statements by the purchasers since they were "under oath"[4] and that, even if there were reasonable inferences in the record "casting doubt upon the veracity of the affiant" who swore to the Schedule 13D, the falsity or incompleteness or misleading character of the Schedule was not cognizable in an equitable action by the target corporation so long as the Schedule facially met the requirements of the statute.

III

The threshold question raised by the defendants addresses the standing of the plaintiff to maintain this action. The district court found, and the defendants press the point on this appeal, that section 13(d) was enacted for the sole benefit of stockholders and not to provide "armament" to management in resisting takeovers or accumulations of the stock of corporations. Since the plaintiff corporation is not thus "within" the particular class intended to be protected by the statute, "it has no standing to maintain an action" under the statute. For this proposition, the defendants rely, as did the district court, on *Rondeau v. Mosinee Paper Corp.*, (1975) 422 U.S. 49, and *Piper v. Chris-Craft Industries*, (1977) 430 U.S. 1. Neither case is, in

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[3]It is of interest that the district court stated in its oral order of dismissal that it had inquired during argument of defendants' counsel what jurisdiction the court might have in this case if the 13D Schedule were "false and misleading" in some substantial respect but that counsel "didn't want to answer that question and didn't answer it."

[4]The language of the district court was:

> "I know that there has been a 13D filed which on its face complies with the law and it's under oath, therefore, I expect it's true."

our opinion, in point. *Piper* was an action at law by a disappointed tender offeror to recover damages for an alleged violation of § 14(e) of the Securities and Exchange Act of 1934. And, in denying a right of action in favor of the plaintiff, the court carefully cautioned, "[n]or is the target corporation's standing to sue in issue in this case." *Id.* at 42 n. 28, 47 n. 33. It cannot, therefore, be reasonably argued that *Piper* is authority against the right of Dan River to maintain this action.

In *Rondeau,* the sole claim raised by the target corporation in the district court was its right to injunctive relief because the defendant had been tardy in filing its Schedule 13D. 422 U.S. at 57. It was not until the case reached the Supreme Court that the corporation raised the question whether the statements in the Schedule were accurate and truthful and sought to litigate that issue. Because of the failure of the plaintiff to raise the point either in the district or circuit courts, the Supreme Court refused to consider the issue. *Id.* at 61 n. 11. But, the Supreme Court did emphasize in note 9, p. 59, that the case before it "involve[d] only the availability of injunctive relief to remedy a § 13(d) violation following compliance" and cautioned that it was not a decision on "whether or under what circumstances a corporation could obtain a decree enjoining a shareholder who is currently in violation of § 13(d) from acquiring further shares, exercising voting rights, or launching a takeover bid, pending compliance with the reporting requirements."[5]

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[5]These two comments, it seems to us, add up to a suggestion that the target corporation has a right to injunctive relief prior to compliance and, as we later indicate, compliance contemplates not simply the formal filing of a Schedule 13D but the filing of an accurate, truthful Schedule 13D, free of any misleading statements. And that certainly has been the construction of the Supreme Court's language by all the Circuit and District Courts which have been confronted with the question of the target corporation's right to maintain an action when there is a reasonable basis for assailing the accuracy or truthfulness of the essential statements mandated by the statute for inclusion in the 13D Schedule. *E.g., GAF Corporation* v. *Milstein,* 453 F. 2d 709, 721-22 (2d Cir. 1971), *cert.*

(Footnote continued on following page)

The district court, however, construed *Rondeau* as requiring the purchaser merely to file a Schedule 13D which *facially* met the requirements of the statute and as holding that, when there had been such facial compliance, the target corporation thereafter lacked any right to contest, and the Court any jurisdiction to consider, the accuracy or truthfulness of the essential matters stated in the Schedule 13D, irrespective of the basis for the corporation's objections. This conclusion is in direct contradiction of the decision reached in *GAF Corporation v. Milstein,* 453 F. 2d at 721-22, which has long been regarded as the landmark authority on the point. In that case, the court stated the issue:

> "The more difficult question is whether GAF [the target corporation] has standing under section 13(d) to seek an injunction against allegedly false and misleading filings. The Milsteins in their brief argue that 'the short answer' is that false filing does not violate the section that requires the filing—i.e., section 13(d)—but rather the penal provision on false filings, section 32(a), or one of the anti-fraud provisions, for example, section 10(b)." *Id.* at 720.

It is manifest that the position of the defendants in that case was based on the very same circumstances which the district court in this case assigned as a reason for finding want of standing in favor of the plaintiff and lack of jurisdiction on the part of the court. The court in *Milstein,* however, in resolving the issue, reached a contrary conclusion to the district court in this case. It said:

"With this teaching in mind, we conclude that the obliga-

(Footnote continued from previous page)

denied, 406 U.S. 910 (1972); *Wellman* v. *Dickinson,* 475 F. Supp. 783, 817 (S.D.N.Y. 1979); *SEC v. GSC Enterprises, Inc.,* 469 F. Supp. 907, 913 (N.D. Ill. 1979); *W. A. Krueger Co.* v. *Kirkpatrick, Pettis, Smith, Pollan, Inc.,* 466 F. Supp. 800, (D. Neb. 1979) *Scott* v. *Multi-Amp Corp.,* 386 F. Supp. 44, 50 (D.N.J. 1974); Brown, *Changes in Offeror Strategy in Response to New Laws and Regulations,* 28 *Case W. Res. L. Rev.* 843, 858 (1978).

> tion to file *truthful* statements is implicit in the obligation to file with the issuer, and *a fortiori,* the issuer has standing under section 13(d) to seek relief in the event of a false filing." (Italics in opinion) *Id.* at 720.

And it proceeded at some length to justify its conclusion to sustain standing in the target corporation to raise, by appropriate allegations and proof, and jurisdiction in the district court to resolve, the issue of the accuracy and truthfulness of the filing.

This oft-cited case, it would appear, should be conclusive on the issue both of standing and of jurisdiction. The district court apparently dismissed it, though, because it preceded in time *Rondeau.* However, as we have already noticed, there is nothing in *Rondeau* which touched or weakened the decision in *Milstein.* And this has been the view of the courts which have been called upon to consider the standing and jurisdictional issues in the context of a claim of lack of a full and fair disclosure in the 13D Schedule, for, without exception, they have cited and relied on *Milstein* for their own contrary conclusion. A recent example of such reliance is *Securities and Exchange Com'n. v. Savoy Industries,* (D.C. Cir. 1978) 587 F. 2d 1149 and 1165, *cert. denied,* 440 U.S. 913 (1979) where the Court said:

> "Sections 13 (d)(1) and 13 (d)(3) and the rules promulgated thereunder undoubtedly create the duty to file truthfully and completely. To the extent that the violation of sections 13(d)(1) and 13(d)(3) inheres in the Schedule 13D that was filed, it was this duty that was breached. Because section 13(d) was designed, in part, to allow investors an opportunity to know of potential changes in corporate control and to evaluate the situation, and because disclosure that is not accurate subverts this purpose, it is plain that section 13(d) requires the making of a completely truthful statement. *GAF Corp. v. Milstein,* 453 F.

> 2d at 720. 'The reporting provisions of the Exchange Act are clear and unequivocal, and *they are satisfied only by the filing of complete, accurate, and timely reports*' " (citing cases). (Italics added)

Again, in *General Aircraft Corp. v. Lampert,* (1st Cir. 1977) 556 F. 2d 90, a case the district court professed to follow and which involved the adequacy of a 13D Schedule, the defendant challenged "[n]either the availability of a private suit under section 13(d) nor GAC's standing to bring such suit. . . ." *Id.* at 94, n. 5. In noting that conclusion, the court cited both *Rondeau* and *Milstein.* Undoubtedly it cited these cases at this point because, whether raised or not, jurisdictional standing is an issue to be considered *sua sponte* by the court, and, by its citation of these authorities, indicated it had done so, and the relief it later granted supports this conclusion. After discussing the record made in this target corporation's presentation, the court held on the target corporation's claim for relief "that the District Court did not err in finding, for purposes of preliminary relief, that appellants' Schedule 13D was inaccurate and misleading in stating that the purchase of shares was for the purpose of investment rather than acquisition of control." *Id.* at 95-6. In reaching that conclusion it began by approving as a definition of control within the contemplation of section 13(d) the definition set forth in § 12b-2(f), 17 C.F.R., Regulations of the Exchange Commission.[6] After finding the Schedule 13D in that case "a false one," the court next proceeded to consider the remedy available to the corporation. It ended by holding that, when there is a finding that a 13D Schedule is incomplete, inaccurate or false, the corporation has a right to injunctive relief "until the Schedule 13D is amended to reflect accurately their [the officers'] intentions." *Id.* at 97.

In *Chromalloy American Corp. v. Sun Chemical Corp.,* (8th Cir. 1979) 611 F. 2d 240, the court similarly sustained the

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[6] 17 C.F.R. §240-12b-1.

target corporation's standing to maintain, and the court's power to decide, an equitable action halting all purchases of Cromalloy stock by Sun and prohibiting Sun's use of already acquired stock to influence Chromalloy management until the completeness and truthfulness of a 13D Schedule could be adjudicated. The court found, after an evidentiary hearing, that Sun's statement of purpose in its 13D Schedule was inaccurate in that it "intended [through its acquisitions] to exert considerable influence" over the actions of Chromalloy's Directors, thereby securing what was for purposes of § 13(d) control of Chromalloy. *Id.* at 243. It proceeded, "[p]ursuant to 15 U.S.C. § 78m(d) [to enjoin] further acquisition of Chromalloy stock until Sun's Schedule 13D was amended to reflect this intention." Sun appealed this action and Chromalloy in turn appealed the failure of the district court to grant further disclosure. The circuit court sustained the district court in both rulings, thus sustaining the right of the target corporation to secure equitable relief requiring the purchaser to file an accurate, truthful, and complete Schedule 13D in order to make what the court specified as a "full and fair disclosure." *Id.* at 248 n. C16.

Under the reasoning of these cases, it follows that Dan River has a right to seek equitable relief enjoining the defendants and should Dan River establish that there is a reasonable basis for concluding that the Schedule 13D filed by the defendants is inaccurate, incomplete, or misleading in its statement of any of the matters expressly demanded by section 13(d), the district court may and should grant appropriate injunctive relief and should require the filing of an amended Schedule 13D complying with the requirement of a truthful and complete statement as contemplated under the statute. The real question that the district court should have addressed, then, was whether the plaintiff's showing of the alleged inaccurate, untruthful, incomplete, or misleading character of the defendant's Schedule 13D was sufficient to resist a motion to dismiss or a motion for summary judgment. That was the crucial issue in the case and the issue the district court did not address. Generally, this issue pre-

sents "a question of fact that cannot be resolved on [a] motion to dismiss." *Securities Exchange Com'n. v. GSC Enterprises,* (N.D. Ill. 1979) 469 F. Supp. 907, 913.

The two matters in the amended 13D Schedule to which Dan River takes particular exception and on which it primarily relies for its claim that the amended Schedule was inaccurate and incomplete are, first, the failure of the defendants to have filed an earlier Schedule 13D when at the close of business on December 12, 1978, as contended by the plaintiff but denied by the defendants, Unitex and the group affiliated with it first acquired more than five percent of Dan River's stock, and, second, the statement of purpose of acquisition included by the defendants in their amended Schedule 13D, a statement which Dan River contends was incomplete, inaccurate, and misleading.

We need not tarry over Dan River's first objection. Assuming that the defendants violated section 13(d) when they failed within ten days after December 12, 1978, to file a Schedule 13D, we believe that violation was rendered moot when the defendants later did file their Schedule 13D. As the district court correctly observed, section 13(d) is a disclosure statute intended for the benefit of stockholders. We have already noted that the sole basis of standing in favor of the corporation itself is to enforce the statutory mandate to file a Schedule 13D, which is complete, accurate, truthful, and not misleading. When the defendants in this case filed their original Schedule, even though tardy, the issue became not the earlier failure to disclose, but the truthfulness and accuracy of the Schedule as filed.[7] This is not to say that if any stockholder suffered damages as a result of the tardy filing, he would not be entitled to recover.[8] What we are concerned with here, though, is solely the right of the

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[7] *See Missouri Portland Cement Co.* v. *H. K. Porter Co.,* (8th Cir. 1976) 535 F.2d 388, 396; *Corenco Corporation* v. *Schiavonas & Sons, Inc.,* (2d Cir. 1973) 488 F.2d 207, 214-15.

[8] *See,* Comment, *Private Rights of Action for Damages Under Section 13(d),* 32 *Stan. L. Rev.* 581 (1980).

corporation itself, and, to repeat, that right is limited to equitable relief, compelling the filing of a full and accurate Schedule 13D.

Dan River's main attack is upon the accuracy and completeness of both the original Schedule 13D and the amended Schedule filed by the defendants. The particular statement on which Dan River centers its attack is the statement of purpose of acquisition, as required under the statute. This statement, Dan River charges, is a model of obfuscation, carefully phrased to confuse and conceal. It was this statement, the accuracy, completeness, and misleading character of which the district court found it lacked power to review. This failure to look beyond the face of the filing was, we think, error in light of the record then before the court.

The defendants at no point have declared clearly the purpose of their acquisition. There was unquestionably some purpose on their part quite different from making an "equity investment." The defendants in effect concede as much by their disclaimer of making the purchases as a "passive investor." Implicit in this disclaimer is the idea that there was some purpose beyond mere investment for investment sake. And this conclusion seems compelling when it is noted that the defendant Unitex has pledged all its assets and its major stockholders have pledged their personal credit in order to finance at interest rates two and a half percentage points above the standard prime rate this "equity investment" in another company, located thousands of miles away from its heaquarters in a foreign country, managed by officials unknown to the principals in Unitex, and paying dividends which would amount to only a fraction of what the defendants would be paying in interest in order to carry these purchases. This logic becomes even more persuasive when it is noted that, judging by the size of the loan secured to finance these purchases, the defendants are looking to the purchase of approximately twenty percent of the outstanding equity stock in Dan River. Such an accumulation of stock in a publicly held

corporation frequently is regarded as control of a corporation. It is highly unlikely that Unitex would be seeking control of another corporation at considerable cost to it, if its interest were solely for investment.

If the defendants' purpose in making these purchases is obviously not for investment purposes, what is their purpose? Their statements in their second Schedule 13D seem calculated to convey the notion that their plans are indefinite and unformed. In this Schedule they say they may seek control of Dan River through their purchases, but presently they do not seek control. Of course, at this point in their purchase program when they have acquired but some eight percent of Dan River's stock, they could not hope to exercise control. But what is their intention if they successfully acquire the twenty percent of the Dan River stock they actually seek under their supposed plan of acquisition? Will they then seek control or at least seek to influence the decisions and actions of the target corporation? Is the language of the Schedule to be construed as suggesting that they have no plan, whether exercisable at present or not, in connection with the purchases of Dan River stock when they have made their anticipated purchases? That they have no plan is inconceivable. There are significant items in the record which suggest that the purchases are part of a carefully formulated plan and that, in their extensive purchases, they intend to facilitate that plan. Thus, when the defendants sought financing for their purchases from Wardley, their lead banker, they were told that Wardley would consider the proposed financing, but only if it was convinced of the "financial soundness of Unitex's plan." Wardley agreed to finance the purchase. Presumably, then, Unitex disclosed to Wardley its purpose and plan in the proposed purchase. What was that "plan"? The defendants do not disclose it in this Schedule 13D. Moreover, when Unitex engaged the services of Lazard it is unlikely that it engaged the services of such an international financial firm with a recognized expertise in corporate mergers and acquisitions, simply to act as a broker merely to purchase stock. Was Lazard to assist in

the plan disclosed by Unitex to Wardley? We can only conjecture.

The defendants did disclose in their first Schedule 13D what might have been an indication of their purpose. In this Schedule, they said that: "Mannip may seek to acquire a significant equity interest in the Company with a view toward establishing a long term relationship with the Company." This is close to a declaration of an intention to seek to control the target corporation for what the defendants would undoubtedly claim was for the mutual advantage of both parties.[9] But, in its second filing the defendants omitted this significant admission of purpose. Are not the stockholders of the target corporation entitled to know what kind of "long term relationship" with Dan River the defendants sought to acquire by their purchases and would it not

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[9]Although the present requirements for Item 4 of a Schedule 13D do not use the word "control," but rather require disclosure of any "plans or proposals which result in or relate to extraordinary corporate transactions," SEC Exchange Act Release Nos. 33-5925, 34-14692, IC-10212, 43 Fed. Reg. 18484, 18493 (1978), the Eighth Circuit assumed, and we think correctly, that "any control purpose is still measurable against the definition of control appearing in Rule 12b-2(f)." *Chromalloy American Corp.* v. *Sun Chemical Corp.*, 611 F.2d at 245-46, 246 n.12. Moreover, in defining "control" as applicable to a Schedule 13D filing, *Chromalloy*, *Id.* at 246-47, directs us to look to Rule 12b-2(f), which provides:

> "The term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

17 C.F.R. § 240.12b-2(f) (1979). Under this definition we believe that section 13(d) requires disclosure of a control purpose whenever "the securities purchaser has a perceptible desire to influence substantially the issuer's operations," 611 F. 2d at 246-47 (citing *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co.*, 476 F. 2d 687, 696-97 (2d Cir. 1973)), regardless of proof of a "fixed plan" to acquire control. 611 F. 2d at 247. That is, "Item 4 of Schedule 13 D requires disclosure of a purpose to acquire control, [a word encompassing even 'the [indirect] power to . . . cause the direction of . . . policies,'] even though this intention has not taken shape as a fixed plan." *Id.*

be relevant to know why this statement of purpose was omitted from the second schedule? Are not the two Schedules contradictory, or at least confusing?

We raise these questions, not because we find the answers to them in the record, but merely to suggest that the pleadings and the showing of the parties raise relevant questions that require further inquiry and that "cannot be resolved on [a] motion to dismiss." *Securities Exchange Com'n. v. GSC Enterprises,* 469 F. Supp. at 913. In reviewing the record of this case, we emphasize that we are not holding that the defendants' Schedule 13D is actually false, incomplete, or misleading. Moreover, that is not our function in this appeal. We simply conclude that Dan River has raised sufficient questions about the defendants' compliance with the law to require further exploration by the district court and the parties into the defendants' purpose in purchasing large amounts of Dan River stock. Because, as one court has stated, "a false filing may be more detrimental to the informed operation of the securities markets than no filing at all," *GAF Corporation v. Milstein,* 453 F. 2d at 720, a court simply cannot turn a blind eye to a potentially inaccurate filing when it possesses the injunctive power to have that filing corrected before irreparable harm occurs to the investing public.

It is no answer to plaintiff's cause of action that the defendants' filing is facially sufficient. When a plaintiff raises the number and kind of doubts about a Schedule 13D that Dan River raises here, a court is not to take a mechanical approach by refusing further inquiry into the plaintiff's allegations solely because the filing is facially adequate. *See S.E.C. v. Capital Gains Research Bureau,* 375 U.S. 180, 195 (1963). Nor is it realistic for a court to rely, as apparently the district court in part did in this case, on the defendants' verifications of their amended 13D Schedule when one considers that the same Unitex officer also verified the initial Schedule, and that Dan River similarly verified its allegations. Rather, because Dan River offered sufficient information to show the very real possibility that the defendants'

filings were not totally true or complete, it was justified in seeking the additional discovery necessary for the ultimate determination of whether the Schedule filed was accurate. *See Sun First Nat. Bank of Orlando v. Miller,* 77 F.R.D. 430, 438 (S.D.N.Y. 1978).

The record suffices to make the truthfulness and completeness of the defendants' Schedule a justiciable issue into which the district court should have inquired. The uses of discovery and hearings are the usual judicial devices employed to resolve such justiciable disputes over the correctness of Schedules 13D. *See, e.g., Chromalloy American Corp. v. Sun Chemical Corp.,* 611 F. 2d 240 at 247; *General Aircraft Corp. v. Lampert,* 556 F. 2d at 96-97; *GAF Corporation v. Milstein,* 453 F. 2d at 720-21; *Susquehanna Corp. v. Pan American Sulphur Co.,* 423 F. 2d 1075, 1084-1086, (5th Cir. 1970); *Transcon Lines v. A. G. Becker, Inc.,* 470 F. Supp. 356, 378-79 (S.D.N.Y. 1979); *Financial General Bankshares, Inc. v. Lance,* 80 F.R.D. 22, 23, (D.D.C. 1978); *Securities and Exchange Com'n. v. Zimmerman,* 407 F. Supp. 623, 630-31, (D.D.C. 1976), *aff'd in part, vacated and remanded in part sub. nom. Securities and Exchange Com'n. v. Savoy Industries,* 587 F. 2d 1149 (D.C. Cir. 1978), *cert. denied sub. nom. Zimmerman v. Securities and Exchange Commission,* 440 U.S. 913 (1979). The plaintiff has made a sufficient showing to support that right here. This does not mean that the plaintiff may use the discovery processes to harass the defendants or needlessly delay the resolution of this controversy. The district court is, however, perfectly competent to keep the discovery within the range of relevancy and to prevent the use of the court's processes for delay.

In reaching this conclusion we subscribe to the "[a]ccepted judicial philosophy [which] is to refrain from dismissing securities claims where it is possible that plaintiff can establish a jurisdictional basis for its claims upon completion of additional discovery." *Sun First Nat. Bank of Orlando v. Miller,* 77 F.R.D. at 435. This predisposition against summary dismissal of secu-

rities claims without discovery comports with a similar judicial sentiment held for all actions arising from complicated factual patterns. *E.g., Greenville Publishing Co., Inc. v. Daily Reflector, Inc.*, 496 F. 2d 391, 398 (4th Cir. 1974) (antitrust); *Umdenstock v. American Mtge. & Inv. Co. of Oklahoma City*, 495 F. 2d 589, 592 (10th Cir. 1974) (antitrust). A "sparing" use of summary procedures is particularly appropriate in litigation "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962) (antitrust); *see Robinson v. Penn Central Company*, 58 F.R.D. 436, 440-41 (S.D.N.Y. 1973) (securities laws).

The key issue in this case is the defendants' motive and intent in buying Dan River stock. Dan River wants to know this, and the investing public has a right to know it as well. Yet only the defendants can clarify the confusion they have created on this point; the proof is in their hands. If Dan River is not allowed to obtain from the defendants through discovery the facts vital to prosecuting this action, the defendants are effectively freed from the obligation of filing a complete and accurate Schedule 13D for only they can publish their motives and intent—as the law requires them to do. We believe that since the information crucial to this case is concentrated in the hands of the defendants, this is precisely the kind of litigation the Supreme Court said is inappropriate for the summary dismissal procedure it received. The defendants have shown no "adequate justification for denying plaintiff the opportunity to question [them] about the accuracy of the Schedule 13D" they filed, *Financial General Bankshares, Inc. v. Lance*, 80 F.R.D. 22, 22 (D.C. 1978); *cf. Robinson v. Penn Central Company*, 58 F.R.D. at 440 (appropriateness of discovering a defendant's knowledge prior to dismissal of a 10b-5 action).

Accordingly, we reverse the district court's dismissal of this action and remand the case to the district court for further pro-

ceedings not inconsistent with the foregoing. On remand the parties should be permitted to offer additional proof and to engage in any meaningful discovery, within the court's discretion. The issue on remand, however, should be restricted to the accuracy and completeness of the defendants' statement of purpose. On the present record, no cause of action is stated against the appellees Wardley Limited and The Chartered Bank, and on remand the district court is directed to dismiss from this action the appellees Wardley Limited and The Chartered Bank.

REMANDED WITH INSTRUCTIONS

APPENDIX B—Transcript of District Court's Decision.

EXCERPT FROM PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, HON. D. DORTCH WARRINER, U.S.D.J., IN CIVIL ACTION NO. 79-0217-R, MARCH 30, 1979.

THE COURT: Ladies and gentlemen, I have enjoyed your presentation of the issue and though your briefs were lengthy, rather than brief, I think that the subject matter was not inappropriately dealt with.

I start off with the premise that the Williams Act is an Act which was intended to require disclosure and that that was all that was intended by the Williams Act. It specifically was not intended as a tool for management to preserve their offices. It was intended for the benefit of investors and not management.

Management necessarily plays a part in the Williams Act disclosure because the selfish interests, which are perfectly legitimate selfish interests, the selfish interests of management and their actual presence on the firing line puts them in contact with those who are attempting to gain control or invest heavily. Thus management is expected to be and properly is the conduit by which the disclosed information is transmitted to the investors. But, so far as I can see in the language of the Act, and in the legislative history of the Act, and in the Supreme Court's discussion of the Act that is the only role that management plays; that [of] a conduit.

Insofar as the Act is concerned and—of course, management has an absolute right to do whatever it can to try to hang onto its job, and I would certainly not do anything to denigrate from that right or from the propriety of the exercise of that right. But, under the Williams Act there is no provision there that is intended for the benefit of management. To a certain extent, management has no rights under the Williams Act and yet it is clear that management has a role under the Williams Act and management in this case has exercised that role to see to it that

disclosure is made so that they are in a position to carry out their role, that is, transmitting the information required by the Williams Act to its stockholders.

My view in this regard is supported—not supported—it is based upon *Rondeau,* 422 US at Page 58, where it says, "The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. That's the initial premise that I have.

I look also to what rights do the shareholders have? If one takes a closeup view and says management has no rights, only a role, is one myopically forgetting the fact that that role is an extremely important role for the protection of the shareholders?

The First Circuit in 1977 in *General Aircraft Corporation v. Lampert,* I think, answers that question when it says at Page—it's 556 F. 2d, 90, at Page 97 it says in effect that "any shareholder has an adequate remedy at law for damages and it is the shareholder, not management, that the Williams Act was intended to protect." I don't think that's disputed. I think, *Rondeau* makes that clear.

It's also pointed out by the Ninth Circuit in *Klaus v. Hi-Shear Corporation,* 528 F. 2d, 225, at Pages 231 and 232.

Now with that framework in mind, let's bear in mind that any suit based upon the Williams Act is a suit that seeks and only can seek, because of the confines of the Act, the purpose of the Act, the limits of the Act, that suit only can seek disclosure. The end of the suit would be disclosure. It would be the Alpha and the Omega, too. You start seeking disclosure, you end obtaining disclosure. There are no other rights under the Williams Act than that there be disclosure.

Another word for disclosure is discovery. If the contentions made by the plaintiff in this case are correct, then one way or

another a plaintiff which files a Williams Act complaint will win. There would never be any question about the case from the very beginning. If they are entitled to discovery in order to determine whether or not the facts are present which entitles them to discovery then the means is the end, and they win merely by exercising the means.

Now there's nothing evil in a plaintiff winning, nor is there anything evil in the defendant winning. Whoever is entitled to prevail in a law suit ought to win, but I do not believe that the rules of discovery, nor the rules of the entitlement to discovery prior to dismissal, are properly being interpreted when the result is that by the impact of those rules plaintiff inevitably and in every case prevails on the very essence, the very gravamen of the case. Discovery. Disclosure.

If plaintiff is correct, no matter how facially adequate a Form 13-D may be, if plaintiff management can in good faith question by affidavit or otherwise that that facially adequate 13-D is not completely accurate or not absolutely complete then merely by that act, merely by filing such an affidavit, according to plaintiff's contentions, plaintiff then has not only crossed the threshold, they have gone all the way through the hall and out the back door because they are entitled then to disclosure. They're entitled not only to learn, according to plaintiff's contention, not only to learn that which Congress says they were entitled to learn, but everything else that discovery in modern practice has led us to expect.

We have all seen it in litigation, hogsheads full of documents, wheelbarrow loads of depositions. The expenditure of time and money and effort that sometimes actually dwarfs the subject matter of the suit. Congress never intended that. Congress after careful consideration enacted legislation which said exactly what you are entitled to know and the form itself with all of its appendages is bulky enough. That which Congress said you are entitled to know is quite a bit, but they never said that a plaintiff

was entitled to know all of those things that one learns through modern discovery.

If plaintiff is entitled to prevail in this case in the face of a facially adequate 13-D then I know of no limits upon 13-D plaintiff complaints.

I have probably had the same experience that all other lawyers have. If you read over a document prepared by someone else you can find something wrong with it—in good faith find something wrong with it. If you read over an affidavit, no matter how adequate an effort may have been made to make it complete and accurate, questions can arise and according to plaintiff that's all it takes. They're then entitled to wide ranging discovery without any particular limit.

Now if that's what Congress had intended, I think that the law would read thusly. "Whenever a person or a group of persons acquires more than five per cent of a stock of a publicly traded corporation they shall disclose that fact and they shall thereupon be subjected to discovery under the Federal Rules of Discovery," because in essence that's all we have here. That's all the excuse we have here, I should say.

Now I asked Mr. Schwartz a question. Suppose his 13-D is false and misleading, and Mr. Schwartz didn't want to answer that question and didn't answer it, but I have to answer it. I have to indulge that supposition. I recognize that it may be false and misleading. If it is false and misleading the protected parties under the Williams Act have an adequate remedy at law. If that is so, and I cannot imagine that it is not so, then there's no grounds for equitable relief. I have compared the verified complaint that plaintiff has filed, the amended complaint, and I have prepared the telltale signs set forth on Pages 9 and 10 of plaintiff's brief filed on the 8th of March, with the amended 13-D, and I am satisfied that facially the 13-D meets the letter and the spirit of the Williams Act. I'm also satisfied that any falsity

or misleading portion of the 13-D will reveal itself in due time if it exists and that if it exists, when it reveals itself it will subject the defendants to severe and proper damages, recision, and possibly other punishments and that that's what the law intends.

Plaintiff in its brief stated that facts are the ultimate issue in this case and as I have stated I agree with that. A right to know facts is the ultimate issue and the facts that the plaintiff has a right to know are the facts that Congress said should be disclosed under the Williams Act. If plaintiff is entitled to substantial additional facts—that is to say, if plaintiff is entitled to win because it has posited in a verified form suspicions, then 13-D cases will be won or lost on the willingness of a plaintiff to say under oath, "I honestly question the accuracy and completeness of that 13-D" and as I have said, I can't imagine an affidavit or a 13-D when subjected to careful scrutiny by a learned and able counsel which couldn't be questioned in some way, honestly questioned, in good faith questioned.

When plaintiff came into this Court initially and pointed to deficiencies in the 13-D and this Court examined the 13-D and saw that on its face those deficiencies existed the Court gave plaintiff the remedy that the Court thought it was entitled to and that is because the 13-D on its face appeared deficient. The 13-D on its face no longer appears deficient. The deficiencies, if any exists, are deficiencies that are made to seem, made to exist by recourse to inference, rumor, street talk, strained logic; and I cannot on the basis of such render an Act of Congress moot and that is what is being suggested here. That I require the disclosure of far more than Congress requires the disclosure of.

In other words, when defendants' conduct on its face fails to comply with the law the Court should issue an injunction and that's what this Court did. When on its face the defendant has complied with the law, then all of the relief which plaintiff is

entitled to has been granted. Further recourse is granted by law to those who are protected by the Act, the shareholders.

Now several cases have been cited to the Court. Of particular interest to the Court was the *Kaye* case. I do not read the *Kaye* case as being either directly on point or dispositive. The prayer for relief in this case is, as it had to be, for disclosure, for discovery, for the information that Williams Act directs shall be filed. The prayer for relief in *Kaye* case was that the defendant Equimark relinquish control of FSC. It didn't seek any information. It was not a case seeking information, discovery, disclosure. It was a case seeking an injunction that the defendant release control. The defendant Equimark during the pendency of the suit sold its stock to two other persons and thereupon filed a motion to dismiss on the ground of mootness. The district court dismissed on the grounds of mootness and was reversed by the Second Circuit. The Second Circuit said that the plaintiff was entitled to have discovery as to whether or not the transfer of stock was a sham. If it were a sham then Equimark still had control and could be affected by an injunction which said relinquish control. Now that's not what we have here.

This case is not about control of Dan River, Inc. It's not about any act. It is about information and that information has been given. It having been given then any continuation of the case is to use the Williams Act as "a weapon for management to discourage takeover bids or prevent large accumulation of stock."

Now gentlemen, I think that in a good lawyerlike manner that is what is being attempted here. I was concerned about the *Quern* case, but *Quern* case is not like this case. In *Quern* case the defendant was engaged in an ongoing program and the question was: Having renounced his former ways and having adopted a new program which complied with the law, should the case be dismissed as moot? The Court said, no, because that program could be changed and an illegal procedure could be re-initiated by the defendant. But, there is no way that the 13-D which was

filed in this case can be changed and that's what we're talking about.

The Williams Act says you're entitled to a 13-D. That 13-D has been filed. It is on record. The rights that shareholders have because that 13-D may be false or misleading have accrued and each share of stock that's being traded today on the stock market is a share of stock that carries with it, possibly, the right to damages and recision because of the possibility that that 13-D is false and misleading and nothing can change that. It's on record. It is, I suppose, in indelible ink.

If I were to hold this case on the docket for the purpose of developing the question of whether or not the 13-D is false and misleading, I would be holding the case on the docket for the purpose of rendering an advisory opinion; an opinion to be used by shareholders, the beneficiaries of the Williams Act, in their subsequent cases for damages. What management, the plaintiff here, has a right to do is transmit this information to the shareholders. I think, management also has a right in the course of its business operation to learn, not through the processes of the Draconian processes of discovery, but through the business world—to learn that the 13-D was false and misleading and then "sic" the stockholders on the defendants. And if it is false and misleading I hope that they get every penny that's coming to them.

I have heretofore ruled that the initial 13-D was inadequate on its face. I now rule that the amended 13-D is adequate on its face and complies with the law and that the countervailing affidavits, evidence, and arguments of plaintiff, even if true, are insufficient in a case such as this where discovery is the end all and be all. I cannot pretend a justiciable issue exists when under the Williams Act none exists.

Plaintiff argued in brief but not before the Court the fact that the recision issue still exists and pointed to *Financial General.*

The Court in *Financial General* did not order recision. The Court in *Financial General* ordered that if the investors, the takeover people, intended to continue their activities, that they had to offer recision to stockholders who had purchased stock without knowledge of the fact that a takeover was impending. That's a far cry from ordering recision. Under that order the defendants didn't have to do anything. They were limited in what they could do insofar as the takeover is concerned, but not otherwise.

I read *Blue Chip Stamps v. Manor Drug Stores*, 421 US 723, at Pages 740 through 742, as a rather clear indication from the Supreme Court that securities laws governing disclosure should not be used as a basis for a law suit aimed primarily at discovery. I believe that defendants' 13-D discloses all the information that plaintiff is entitled to under the Williams Act and that if that information is false then—and I quote from *Rondeau* at Page 58—"those persons who allegedly sold at an unfairly depressed price because of the false and misleading 13-D have an adequate remedy by way of an action for damages thus negating the basis for equitable relief."

I do not believe that there is any basis for equitable relief remaining in this case. That is the only relief that was properly sought and under those circumstances I can't enter a judgment which would affect the actions of anyone. Accordingly, I am going to direct that a docket entry be made dismissing the action for mootness.

Is there anything further, gentlemen?

(No response.)

(End of Excerpt of Report of Proceedings.)

APPENDIX C—Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1267

DAN RIVER, INC.,

Appellant,

versus

UNITEX LIMITED; MANNIP LIMITED; CHENG FUR SHE; CHENG LEE KIT-YIU; PHILIP Y. S. CHENG; LEE CHEN CHE; LIU HAN TANG; YANG YUAN LOONG; DORA YANG; THE "ROE" BANK OF HONG KONG; THE "DOE" FINANCE COMPANY OF HONG KONG; "XYZ" COMPANY,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the U.S. District Court for the Eastern District of Virginia, at Richmond, for further proceedings not inconsistent with the opinion of this Court filed herewith.

FILED
May 29 1980
U.S. Court of Appeal
Fourth Circuit

A True Copy, Teste:
William K. Slate, II, Clerk

APPENDIX D—Statutes involved.

TEXT OF SECTION 13(d)

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) The background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the name of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months; does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection

as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

TEXT OF SECTION 18

Sec. 18. (a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorney's fees, against either party litigant.

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

No. 80-293

SEP 24 1980
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITEX LIMITED, *et al.*,

Petitioners,

v.

DAN RIVER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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DAN RIVER, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Dan River, Inc. respectfully requests that this Court deny the petition for a writ of certiorari to review the unanimous decision of the Fourth Circuit. That court's opinion, not yet officially reported, appears at [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,515.

Questions Presented

1. Whether this Court should review an interlocutory decision of the court of appeals holding that respondent was entitled, on the particular facts alleged, to at least minimal pre-trial discovery before its complaint was dismissed.

2. Whether the court of appeals erred when, in accord with every other circuit court and virtually every district court, it held that a target company has standing to seek equitable relief for an alleged violation of Section 13(d) of the Williams Act.

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RESPONDENT'S BRIEF IN OPPOSITION

Counterstatement of the Case

In the fall of 1978, petitioner Unitex Limited, a Hong Kong corporation, and its controlling directors and shareholders secretly began to acquire a substantial position in the stock of respondent Dan River, Inc., a public company listed on the New York Stock Exchange. By December 12, 1978, the complaint alleges, petitioners (alone or as part of a larger related group) had acquired more than 5% of Dan River's outstanding stock. They were therefore obligated under § 13(d) of the Williams Act, 15 U.S.C. § 78m(d), promptly to file with the Securities and Exchange Commission and to mail to respondent a Schedule 13D disclosing extensive details concerning their purchases, including the purposes of the stock acquisition. Instead of filing the required Schedule 13D, the complaint alleges, petitioners sold off enough Dan River stock on December 14, 1978 to bring their holdings just under 5%, in an unsuccessful effort to evade the statutory filing requirements.

On January 29, 1979—after organizing petitioner Mannip Limited, a shell British Virgin Islands corporation, to hold their Dan River stockholdings and after obtaining financing for substantial further purchases of Dan River stock (financing which involved more than Unitex's entire net worth)—petitioners resumed purchasing Dan River stock, and brought their holdings again above 5%.

On February 9, 1979, for the first time, a Schedule 13D was filed with the SEC and mailed to Dan River, on behalf of petitioner Mannip. That Schedule 13D, however, was plainly defective in failing to disclose certain clearly required information, and it contained a vague, self-contradictory, and inherently uninformative "purpose clause" (set out in full at 5a*).

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* Citations of numbers followed by "a" are to the pages of the appendices to the petition.

On February 22, 1979, Dan River filed a complaint in the United States District Court for the Eastern District of Virginia citing numerous omissions and misleading statements in Mannip's Schedule 13D and seeking declaratory, injunctive and other equitable relief. After a hearing on Dan River's application for a temporary restraining order, the district court ruled that Dan River's "right to [additional] disclosure [was] clear." It restrained petitioners from making any additional purchases of Dan River stock until they filed "an amended or new Schedule 13D which makes the appropriate disclosures." The court entered a restraining order and directed speedy pre-trial discovery.

Mannip and Unitex filed an amended Schedule 13D on March 1, 1979. While the new filing supplied a number of the omissions cited by the district court, it still failed to disclose certain required information and, more important, it did not rectify the inconsistencies in the "purpose clause." Indeed, the new "purpose clause" (set out at 7a), as the circuit court later noted (17a-20a), was blatantly inconsistent with the purpose clause in the first filing. For example, the intitial Schedule 13D hinted darkly at some "long term relationship" sought by petitioners, while the amended filing asserted that petitioners sought to be investors only.

The amended Schedule 13D was accompanied by a motion by petitioners to dismiss the complaint for lack of subject matter jurisdiction as moot and a motion that respondent be denied any pre-trial discovery.

Dan River amended its complaint to assert that the amended Schedule 13D—particularly the suggestion in the purpose clause that petitioners had an investment intent only—was itself false and misleading.

At a hearing on March 2, 1979, the district court vacated the temporary restraining order and refused to afford Dan River any discovery—despite the fact that the circumstances surrounding petitioners' purchases indicated that their profession of an investment intent only was at best misleading. After further briefing and argument, the district court dismissed the amended complaint as moot, saying that since the amended Schedule 13D seemed "facially" to comply with the Williams Act, and since the verification of the filing by one of the individual petitioners must be accepted at face value, no cause of action could lie. The district court's opinion, among its other deficiencies, failed to appreciate that the verification of the amended filing was made by the same person who had sworn that the initial filing was true and complete.

On appeal, a panel of the United States Court of Appeals for the Fourth Circuit unanimously reversed and remanded with instructions. The court of appeals reviewed the allegations of the complaint and the many circumstances surrounding petitioners' stock purchases which cast serious doubt on the truthfulness of the purpose clause in the Schedule 13D. It "conclude[d] that Dan River has raised sufficient questions about the defendants' compliance with the law to require further exploration by the district court and the parties into the defendants' purpose in purchasing large amounts of Dan River stock." (20a.) The court of appeals held that the district court erred in focusing only on the "facial" validity of the Schedule 13D, and remanded to permit Dan River to "see[k] the additional discovery [as controlled in the discretion of the district court] necessary for the ultimate determination of whether the Schedule filed was accurate." (20a-21a.) The court of appeals also addressed the question of Dan River's standing to seek equitable relief under Section 13(d) of the Williams Act, and it concluded, following the reasoning of *GAF Corp.* v.

Milstein, 453 F.2d 709 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972), and other circuit courts, that an issuer does have standing. (10a-15a.)

Reasons for Denying the Writ

I.

The Fourth Circuit's Interlocutory Decision Is Not Ripe For Review.

This Court has stated repeatedly that it will not review interlocutory decisions except in "extraordinary" circumstances because "many [interlocutory] orders . . . become quite unimportant by reason of the final result or of intervening matters." *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.,* 148 U.S. 372, 384 (1893). *See also Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.,* 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 230 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree."); R. Stern & E. Gressman, *Supreme Court Practice* § 4.19, at 300-01 (5th ed. 1978).

There is here no "extraordinary" circumstances warranting departure from the Court's "normal practice." *Estelle* v. *Gamble,* 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting). To the contrary; the narrow, routine order of the court of appeals was based on an examination of the particular facts alleged and shown in this case. The court of appeals "emphasize[d]" that it was making no finding on the ultimate question of whether petitioners violated the Williams Act. (20a.) Upon further proceedings on remand petitioners may prevail. The order below was merely

one allowing respondent to have minimal discovery. A more "ordinary" interlocutory decision would be difficult to envisage. This is not an appropriate case for this Court to review *any* issue.

II.

The Fourth Circuit's Decision On Standing Is In Accord With The Decisions Of This Court And Every Other Circuit Court And Is Correct.

Petitioners ask this Court to consider the court of appeals' decision on the issue whether a target corporation has standing to seek equitable relief to remedy a violation of § 13(d) of the Williams Act. But that "issue"—which petitioners treated almost as a footnote point below—has generated no conflict among the circuits, no particular controversy, no spate of scholarly articles, nor any of the other indicia of importance typical of the kinds of questions that merit this Court's attention.

For the reasons set out in the Fourth Circuit's opinion (10a-15a), the unanimous view of the circuits is both in accord with this Court's decision in *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975), and is correct.

Without exception, every circuit court faced with such a suit has concluded—with the Fourth Circuit—that a target corporation may seek equitable relief under § 13(d).* The

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* *See, e.g., Treadway Companies, Inc.* v. *Care Corp.*, [*Current*] Fed. Sec. L. Rep. (CCH) ¶ 97,603 (2d Cir. Aug. 12, 1980); *Chromalloy American Corp.* v. *Sun Chemical Corp.*, 611 F.2d 240 (8th Cir. 1979); *General Aircraft Corp.* v. *Lampert*, 556 F.2d 90, 94 n.5 (1st Cir. 1977); *Stecher-Traung-Schmidt Corp.* v. *Self*, 529 F.2d 567 (2d Cir. 1976); *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719-22 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97 (7th Cir. 1970).

overwhelming majority of district court decisions are in accord.*

Petitioners rely on two district court cases which have reached a contrary result. *Gateway Industries, Inc.* v. *Agency Rent-A-Car, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,540 (N.D. Ill. June 10, 1980), *appeal dismissed per stipulation*, No. 80-1871 (7th Cir. Aug. 11, 1980); *Sta-Rite Industries, Inc.* v. *Nortek, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,613 (E.D. Wis. Aug. 1, 1980). But this Court "will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court." R. Stern & E. Gressman, *Supreme Court Practice* § 4.8, at 278-80.

Petitioners adopt *Gateway* and *Sta-Rite's* reliance on the recent decisions in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). (Petition at 10-13.) That reliance is misplaced.

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* *E.g., Kirsch Co.* v. *Bliss & Laughlin Industries, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,580, at 98,070-71 (W.D. Mich. July 1, 1980; *Wellman* v. *Dickinson*, 475 F. Supp. 783, 817 (S.D.N.Y. 1979); *W. A. Krueger Co.* v. *Kirkpatrick, Pettis, Smith, Polian, Inc.*, 466 F. Supp. 800, 803 (D. Neb. 1979); *Tally Corp.* v. *Pertec Computer Corp.*, No. C78-168V (W.D. Wash. Nov. 6, 1978).

See also, e.g., Lane Bryant, Inc. v. *Hatleigh Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,529 (S.D.N.Y. June 9, 1980); *Transcon Lines* v. *A. G. Becker, Inc.*, 470 F. Supp. 356 (S.D.N.Y. 1979); *Finanial General Bankshares, Inc.* v. *Lance*, [1978] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D.D.C. 1978); *S-G Securities, Inc.* v. *Fuqua Investment Co.*, 466 F. Supp. 1114, 1127-28, 1132 (D. Mass. 1979); *Jewelcor Inc.* v. *Pearlman*, 397 F. Supp. 221 (S.D.N.Y. 1975); *Twin Fair, Inc.* v. *Reger*, 394 F. Supp. 156 (W.D.N.Y. 1975); *Graphic Sciences, Inc.* v. *International Mogul Mines, Ltd.*, 397 F. Supp. 112 (D.D.C. 1974); *Scott* v. *Multi-Amp Corp.*, 386 F. Supp. 44, 50 (D.N.J. 1974); *Water & Wall Associates, Inc.* v. *American Consumer Industries, Inc.*, [1973] Fed. Sec. L. Rep. (CCH) ¶ 93,943 (D.N.J. 1973); *Nicholson File Co.* v. *H. K. Porter Co.*, 341 F. Supp. 508 (D.R.I. 1972).

First, neither *Transamerica* nor *Touche Ross* involved Section 13(d) of the Williams Act. Unlike the statutes construed in *Transamerica* and *Touche Ross*, Section 13(d) does create federal rights in a discrete, readily-identified class of persons—the shareholders of the target corporation and the target corporation itself (a statutory recipient of the Schedule 13D), who have been recognized as, respectively, the beneficiaries of a specific right to certain disclosures concerning a person who acquires more than 5% of the target's stock and the entity in the best position to vindicate the shareholders' right. *See, e.g., Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

Second, the implication of a private right of action is particularly appropriate when, as here, the cause of action seeks only injunctive relief. *See Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. at 42. In contrast, the private right of action rejected by this Court in *Touche Ross* was for damages; and in *Transamerica*, while this Court refused to find a private right of action for damages under one provision (Section 206 of the Investment Advisers Act of 1940), this Court did imply a private right of action for equitable relief under another provision (Section 215) of the same Act. In short, neither *Touche Ross* nor *Transamerica* casts any doubt on the standing—implicitly recognized by this Court in *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975)—of a target company to seek equitable relief for a violation of Section 13(d) of the Williams Act.

III.

The Fourth Circuit's "Decision" On The Availability Of Appropriate Equitable Relief Is Consistent With *Rondeau*.

Petitioners challenge as error the Fourth Circuit's asserted "decision" concerning the ultimate availability of equitable relief on remand in the event a violation of Section 13(d) were proved. There is no question as to the applicable legal standard. Dan River and the courts below recognized that *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 57 (1974), requires a showing of "irreparable harm." (11a-15a, circuit court; 25a, district court.) Thus, the issue petitioners seek to pose is the application of the *Rondeau* standard to the facts of this case.* That is an insufficient reason for this Court to grant review. R. Stern & E. Gressman, *Supreme Court Practice* § 4.14, at 290-91. This Court is not a court of errors. *Id.* § 4.18, at 297-98.

Moreover, the court of appeals has not truly had an opportunity to apply the *Rondeau* standard to the "facts" of this case—the "facts" are not yet known, and will not be known until after the limited discovery ordered on remand. The Fourth Circuit's decision did not award Dan River equitable relief or even order the district court to grant such relief. Its only "decision" on this issue was passing dicta—a statement that, on remand, *if* Dan River proved that petitioners had violated § 13(d), "the district court may and should grant *appropriate* injunctive relief." (15a, emphasis added.)

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* Petitioners fail to perceive the key difference between the facts here and the facts in *Rondeau*. In *Rondeau*, the amended filing *indisputably* cured the defendants' violation under the Williams Act. Here, the very issue on remand is whether petitioners' amended filing itself was false and misleading and therefore a new violation of the Williams Act.

Petitioners argue that, by that statement, the circuit court was requiring the district court to grant injunctive relief if a violation were found, in asserted disregard of *Rondeau*. (Petition at 15.) This reading of the court's opinion is strained. Clearly, the circuit court was doing no more than reminding the district court that *if* a violation were found, the district court could grant whatever equitable relief it believed *"appropriate"*—which might include no relief if none were appropriate under *Rondeau*.

Since no equitable relief of any kind has been granted here, it would be premature for the Court to review this case on the present record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
September 24, 1980

Respectfully submitted,

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OCTOBER TERM, 1980

UNITEX LIMITED, ET AL., PETITIONERS

v.

DAN RIVER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-293

UNITEX LIMITED, ET AL., PETITIONERS

v.

DAN RIVER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a company, whose stock allegedly is being acquired without proper disclosure in violation of Section 13(d) of the Securities Exchange Act of 1934, may bring an action for equitable relief against the acquiring person.

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S.Rep. No. 550, 90th Cong., 1st Sess. (1967)	8-9

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(d), generally requires that a person who acquires the beneficial ownership of more than five percent of any class of equity security registered with the Securities and Exchange Commission and a national stock exchange under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, must, within ten days of such acquisition, send to the issuer of the securities, to each stock exchange where the securities are traded, and to the Commission a report containing information concerning the acquiring party and the transactions involved.[1] The purpose of this disclosure is to give reliable information to corporations, their shareholders, and potential investors, so that those persons can evaluate the significance of a large change in the holding of the company's stock.

Respondent Dan River, Inc. ("Dan River") filed this suit against petitioner Unitex Limited ("Unitex") in the United States District Court for the Eastern District of Virginia seeking equitable relief under Section 13(d) of the Act. Dan River alleged, *inter alia*, that in late 1978 Unitex began acquiring the stock of Dan River, that Unitex's holdings grew to more than five percent of the stock, and that a Schedule 13D filed by Unitex in February 1979 failed to disclose certain required information (Pet. App.

[1] Commission Rule 13d-1 sets forth the information required to be disclosed in a form captioned Schedule 13D. See 17 C.F.R. 240.13d-1.

2a-5a). On February 23, 1979, the district court entered a temporary restraining order barring Unitex from acquiring additional shares of Dan River stock until the earlier of March 30, 1979, or twenty-four hours after the filing of an amended Schedule 13D containing additional specified information (*id.* at 6a). On March 1, 1979, Unitex filed an amended Schedule 13D and also filed a motion to dismiss the complaint on grounds of mootness (*id.* at 6a-8a). On March 2, 1979, Dan River amended its complaint to allege that the amended schedule also was false and misleading (*id.* at 8a-9a). That same day, however, the district court vacated the temporary restraining order. It subsequently dismissed the complaint on mootness grounds without addressing the question whether an issuer corporation has standing to sue for equitable relief under Section 13(d) (*id.* at 24a-31a).

On appeal, the court of appeals held that an issuer "has a right to seek equitable relief" under Section 13(d) (Pet. App. 15a). It reversed the district court's dismissal of the complaint and remanded with instructions that the parties be permitted to engage in limited discovery and offer additional proof respecting the accuracy and completeness of a portion of the Schedule 13D filed by Unitex (*id.* at 22a-23a). In remanding the case for further proceedings, the court of appeals noted (*id.* at 20a-21a):

> In reviewing the record of this case, we emphasize that we are not holding that the defendants' Schedule 13D is actually false, incomplete, or misleading. * * * We simply conclude that Dan River has raised sufficient questions about the defendants' compliance with the law to require further exploration by the district court and the

> parties into the defendants' purpose in purchasing large amounts of Dan River stock. Because, as one court has stated, "a false filing may be more detrimental to the informed operation of the securities markets than no filing at all," * * * a court simply cannot turn a blind eye to a potentially inaccurate filing when it possesses the injunctive power to have that filing corrected before irreparable harm occurs to the investing public. * * * This does not mean that the plaintiff may use the discovery processes to harass the defendants or needlessly delay the resolution of this controversy. The district court is * * * perfectly competent to keep the discovery within the range of relevancy and to prevent the use of the court's processes for delay.

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Moreover, as petitioner concedes (Pet. 7), the decision is consistent with the decisions of every court of appeals that has examined the question. The decision is also interlocutory and does not pass on the merits of the complaint or the appropriateness of equitable relief in the circumstances of this case. Review by this Court at this time is therefore unwarranted.

1. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975), is the only decision of this Court directly involving a private suit for equitable relief under Section 13(d). As the Court explained in *Rondeau*, however, "neither the availability of a private suit under the Williams Act nor [the issuer's] standing to bring it has been questioned here" (422 U.S. at 62). The narrow question before the Court in *Ron-*

deau was whether the issuer was entitled to injunctive relief to remedy a Section 13(d) violation *after* the acquiring party had complied with the statutory reporting requirements. Thus, the Court had no occasion to decide "whether or under what circumstances a corporation could obtain a decree enjoining a shareholder who is currently in violation of § 13(d) * * * pending compliance with the reporting requirements" (422 U.S. at 59 n.9).[2]

The decision in this case, recognizing a limited remedy for an issuer corporation seeking equitable relief to obtain compliance with the statute's filing requirement, plainly does not conflict with *Rondeau*, as the court of appeals explained (see Pet. App. 11a-13a & n.5). In recognizing this limited remedy, the court of appeals followed the consistent line of decisions of the other courts of appeals that have considered the question, including the Second Circuit's leading decision in *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719-721 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972). See Pet. App. 12a-15a.[3]

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[2] The Court held in *Rondeau* that a showing of irreparable harm must be made before a private litigant may obtain injunctive relief in a suit under Section 13(d). The issuer's inability to make that showing after the acquiring party had complied with the statute barred the injunctive remedy sought by the complaint. 422 U.S. at 64-65.

[3] Accord: *Chromalloy American Corp.* v. *Sun Chemical Corp.*, 611 F.2d 240, 248 (8th Cir. 1979); *General Aircraft Corp.* v. *Lampert*, 556 F.2d 90, 94 n.5 (1st Cir. 1977). See also *Treadway Cos., Inc.* v. *Care Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,603 (2d Cir. Aug. 12, 1980); *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97 (7th Cir. 1970).

The court's decision is also in agreement with the overwhelming majority of district court decisions. See *Kirsch Co.* v. *Bliss & Laughlin Industries, Inc.*, 495 F. Supp. 488, 490-492

2. The decision of the court of appeals also is consistent with this Court's recent decisions considering implied rights of action under federal statutes. In those decisions, the Court has instructed that the central inquiry in determining whether a private remedy exists under a statute not expressly providing for one is the intent of Congress. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16, 24 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568, 575 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688-689 (1979). The language of the statute, its legislative history, and the overall statutory scheme must be considered in discerning congressional intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 16-22.

(W.D. Mich. 1980); *Wellman* v. *Dickinson*, 475 F. Supp. 783, 817 (S.D.N.Y. 1979); *W. A. Krueger Co.* v. *Kirkpatrick, Pettis, Smith, Polian, Inc.*, 466 F. Supp. 800, 803 (D. Neb. 1979); *Scott* v. *Multi-Amp Corp.*, 386 F. Supp. 44, 50 (D. N.J. 1974). See also *Lane Bryant, Inc.* v. *Hatleigh Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,529 (S.D.N.Y. June 9, 1980); *Brascan Ltd.* v. *Edper Equities Ltd.*, 477 F. Supp. 773 (S.D.N.Y. 1979); *Transcon Lines* v. *A.G. Becker, Inc.*, 470 F. Supp. 356 (S.D.N.Y. 1979); *Cook United, Inc.* v. *Stockholders Protective Committee of Cook United, Inc.*, [1979] Fed. Sec. L. Rep. (CCH) ¶ 96,875 (S.D.N.Y. May 21, 1979); *S-G Securities, Inc.* v. *Fuqua Investment Co.*, 466 F. Supp. 1114, 1127-1128, 1132 (D. Mass. 1978); *Financial General Bankshares, Inc.* v. *Lance*, [1978] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D. D.C. Apr. 1978); *Universal Container Corp.* v. *Horwitz*, [1977-1978] Fed. Sec. L. Rep. (CCH) ¶ 96,161 (S.D.N.Y. Sept. 6, 1977). Contra: *Gateway Industries, Inc.* v. *Agency Rent A Car, Inc.*, 495 F. Supp. 92 (N.D. Ill. 1980), appeal dismissed per stipulation, No. 80-1871 (7th Cir. Aug. 11, 1980); *Sta-Rite Industries, Inc.* v. *Nortek, Inc.*, 494 F. Supp. 358 (E.D. Wis. 1980).

A central inquiry within this framework is identification of the persons who are the special beneficiaries of the statutory provision in question. *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 689; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Section 13(d) states plainly that it was intended to confer a specific and narrowly delineated right on corporate issuers to receive accurate information about persons obtaining large blocks of their securities. The statute provides that any person who acquires more than five percent of specified classes of equity securities must "send to the issuer of the security at its principal executive office, by registered or certified mail" a disclosure statement containing accurate information as required by the Commission's rules. Thus, the statute, literally read, confers affirmative "federal rights in favor of private parties" (*Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 569)—*i.e.*, the right to receive the information required to be disclosed on SEC Schedule 13D.[4]

As this Court noted in *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 690 & n.13, the existence of a class of specifically designated beneficiaries, appearing on the face of the statute, "has generally been the most accurate indicator of the propriety of implication of a cause of action." Moreover, in conferring affirmative rights on issuer corporations, Sec-

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[4] As the court of appeals recognized, the corporate recipient of the disclosure statement serves as a "conduit" providing information to shareholders. Armed with accurate information, public shareholders of the recipient corporation can make an informed response to any potential shift in control. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977).

tion 13(d) differs significantly from the two provisions of the federal securities laws that this Court has determined do not give rise to private causes of action. Thus, Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(a) (considered in *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 569) is merely a "record keeping" provision. And while Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6 (considered in *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 17, 19) creates "federal fiduciary standards" for investment advisers, that provision simply "proscribes certain conduct." Section 13(d), by contrast, vests in issuer corporations an affirmative right to receive the Schedule 13D disclosure statement, and therefore provides a predicate for a narrow equitable remedy (Pet. App. 16a-17a):

> We have already noted that the sole basis of standing in favor of the corporation itself is to enforce the statutory mandate to file a Schedule 13D, which is complete, accurate, truthful, and not misleading * * * [This] is solely the right of the corporation itself, and * * * that right is limited to equitable relief * * *.

That conclusion is supported by this Court's ruling in *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 18-19, 24 n.14, that clients of investment advisers have a right of action to sue for equitable relief under Section 215 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-15. Here, as in *Transamerica*, "the statutory language itself fairly implies a right to specific and limited relief in a federal court." 444 U.S. at 18.

While the legislative history does not expressly discuss the question of private remedies under Section

13(d), that is not necessarily inconsistent with an intent on Congress' part to make such remedies available.[5] Congressional intent "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* 444 U.S. at 18. The legislative history of Section 13(d) supports the view that a private remedy was meant to be available. Congress passed the Williams Act "to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information." *Piper* v. *Chris-Craft Industries, Inc., supra,* 430 U.S. at 35; *Rondeau* v. *Mosinee Paper Corp., supra,* 422 U.S. at 58.[6] In particular, Section 13(d) was intended to "alert the marketplace to every large, rapid aggregation or accumulation of securities * * * which might represent a potential shift in corporate control."[7]

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[5] In situations such as this, in which the statute clearly confers specific rights upon a class of persons, it is not necessary to show a specific intent to create a private cause of action, although an explicit purpose to deny a private action would be controlling. *Cannon* v. *University of Chicago, supra,* 441 U.S. at 694.

[6] The Williams Act was intended to close a gap in the disclosure requirements of the securities laws. *Piper* v. *Chris-Craft Industries, Inc., supra,* 430 U.S. at 26-27. Originally, the requirements of Section 13(d) were activated when a purchaser acquired more than ten percent of any class of securities covered by the statute. Section 13(d)(1) was amended as of December 22, 1970, to require the filing of a disclosure statement when the acquisition reached five percent. See Pub. L. No. 91-567, 84 Stat. 1497.

[7] *Treadway Cos., Inc.* v. *Care Corp., supra* [Current] Fed. Sec. L. Rep. (CCH) ¶97,603, at 98,209, quoting *GAF Corp.* v. *Milstein, supra,* 453 F.2d at 717. See also S. Rep. No.

Permitting corporate issuers to sue to obtain an accurate Schedule 13D, and to serve thereby as conduits for transmittal of information to their shareholders, is essential to ensure that material information is promptly disclosed as mandated by Congress.

While petitioners correctly assert (Pet. 13) that Congress, in passing the Williams Act, was careful to "avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid" (*Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58-59), it does not follow that granting the issuer corporation a limited private remedy to obtain an accurate Schedule 13D would interfere with that purpose. To the contrary, a private remedy to secure the filing of an accurate disclosure statement is consistent with the kind of contest for control that Congress contemplated—a contest occurring in an environment of full and fair disclosure. The court below cautioned the district court against permitting litigation under Section 13(d) to become an instrument for harassment and delay. And as this Court observed in *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 42, "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, is the time when relief can best be given." Under these circumstances, there is no basis for the assertion that a limited equitable remedy to assure the filing of an accurate disclosure statement would undermine the statutory goal.[8]

550, 90th Cong., 1st Sess. 7 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 8 (1968).

[8] The court's discussion in *Chris-Craft* of Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e)—

3. Contrary to petitioner's suggestion (Pet. 12-13), recognition of a private right of action for equitable relief under Section 13(d) is not inappropriate in light of the express right of action for damages prescribed under Section 18(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78r(a). That Section provides a wholly different kind of relief for differently situated parties. Section 18(a) prescribes a money damages remedy for persons who purchase securities in reliance on materially false or misleading statements contained in documents required to be filed with the Commission. In *Touche Ross & Co.* v. *Redington, supra,* 442 U.S. at 574, the Court declined to recognize a right of action for damages under Section 17(a) of the Act, stating that it was "extremely reluctant" to do so since the implied cause of action would be "significantly broader than the [express] remedy that Congress chose to provide" under Section 18(a). *Ibid.* In contrast to Section 17(a), however, Section 13(d) was enacted over 30 years after the passage of Section 18(a). Thus, analysis of Section 18(a) is of little utility in construing the scope of Section 13(d). See *Cannon* v. *University of Chicago, supra,* 441 U.S. at 698-699.

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another provision of the Williams Act concerned with fraud in connection with tender offers—is instructive here. While disapproving *damage* awards to disappointed tender offerors (who were not the beneficiaries of the statutory scheme), this Court observed that the goal of shareholder protection could best be achieved by "other, less drastic means more closely tailored to the precise congressional goal underlying the Williams Act." 430 U.S. at 40. The limited *equitable* remedy recognized in the present case meets this Court's requirement of a remedy "closely tailored" to the statutory purpose.

Moreover, unlike the damages remedy sought to be implied in *Touche Ross*, an equitable remedy under Section 13(d) to obtain "adequate information regarding the qualifications and intentions" of the acquiring party (*Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58) is not "broader" than the damages remedy prescribed under Section 18(a). To the contrary, an injunction is a narrow remedy designed to prevent future injury.[9] The essential function of an injunctive proceeding under Section 13(d) is to obtain accurate information and an opportunity to assess the plans of the acquiring party before investors purchase or sell securities of the issuer (*ibid.*). Thus, in contests for corporate control, "injunctive relief at an earlier stage of the contest is apt to be the most efficacious form of remedy." *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 40 n.26.[10] This consideration reinforces the conclusion of the court of appeals that the issuer corporation

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[9] Damage awards under Section 18 are inadequate to cure the effects of a statutory violation of Section 13(d) since "[b]y that time it will be too late to avoid the evils which the Williams Act is designed to eliminate." *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 113 (7th Cir. 1970).

[10] This Court observed in *Rondeau* v. *Mosinee Paper Corp.*, *supra*, that money damages would be an adequate remedy to protect the interests of shareholders who had sold their stock to the acquiring party at pre-disclosure prices. 422 U.S. at 59-60. The Court made this observation only after concluding that, because a "proper" schedule 13D already had been filed, there was no continuing likelihood of irreparable injury to shareholders. *Id.* at 59. In this case, in contrast, the crux of Dan River's claim is that a proper Schedule 13D has *never* been filed and that its shareholders are being harmed by the acquiring party's continuing failure to comply with the disclosure requirements of Section 13(d).

has a limited right of action to obtain equitable relief under Section 13(d).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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Securities and Exchange Commission

DECEMBER 1980

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[11] We disagree with petitioner's view (Pet. 14-15) that the decision of the court of appeals interferes with the district court's discretion to grant or withhold equitable relief. In *Rondeau,* this Court discussed the "sound judicial discretion" of the district court after the liability issues in the case had been resolved. In this case, in contrast, the court of appeals' remand order rested on its conclusion that the district court applied an erroneous legal standard in dismissing the complaint when genuine issues of fact remained to be resolved and discovery had not been conducted. The district court acted on the mistaken assumption that filing a Schedule 13D that "facially" meets the requirements of the statute is sufficient, despite "reasonable inferences in the record" casting doubt on the veracity and completeness of the disclosures that were made (Pet. App. 9a-10a, 17a-23a).

It is true that the court of appeals stated that the district court "may and should grant appropriate injunctive relief" if a violation ultimately is proven (Pet. App. 15a). In context, we understand this statement to mean that equitable relief is available to redress a violation, despite facial compliance with the statute, if liability is proven and the traditional prerequisites for such relief are present. As respondent concedes (Br. in Opp. 9), this could mean "no relief if none were appropriate under *Rondeau.*"

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